Supreme Court of the United States

October Term, 1967

No. 823

UNIFORMED SANITATION MEN ASSOCIATION, INC., ET AL.,

Petitioners,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, ET AL.,

Respondents.

JOINT APPENDIX

Rabinowitz, Boudin & Standard,
Attorneys for Petitioners,
30 East 42nd Street,
New York City.

J. Lee Rankin,
Corporation Counsel of the City of New York,
Attorney for Respondents,
Municipal Building,
New York City.

INDEX

United States District Court

For the Southern District of New York

Civil Action File No. 4307

UNIFORMED SANITATION MEN ASSOCIATION, INC., LEONARD MONTELEONE, AUGUST MASCIA, JOSEPH MIRANDA, NUNZIO CHIERICO, BERNARD F. BELLETTIERE, NICHOLAS J. CARUSO, ANSELMO QUINONES, ANTHONY CALABRESE, JAMES D. MINTER, MARCUS F. KING, JOSEPH BARBARA, PETER I. LOMBARDO, PHILIP D'AGOSTINO, ANTHONY D'AMBROSIO, JOHN L. ALESSIO and MICHAEL A. MANGO,

Plaintiffs,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, COMMISSIONER OF INVESTIGATION OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK,

Defendants.

Docket Entries

Date	Proceedings
Dec. 14–66	Filed complaint and issued summons.
Dec. 19–66	Filed deft's affdvt. & show cause order to dismiss, etc.—ret. 12-20-66.
Dec. 19–66	Filed pltff's affdvt. & show cause order to enjoin, etc.—ret. 12-20-66.

Docket Entries

Date	Proceedings
Dec. 19–66	Filed summons & return, served Commr. of Sanitation of City of NY by Mr. L. Mendelson —12-15-66; served Commr. of Investigation of NY by Mr. Arnold G. Fraiman—12-15-66; served City of NY by Mrs. A. Schonbuch—12-15-66.
Dec. 20–66	Filed stip. & order amending the complaint as indicated—Cannella, J.
Dec. 21–66	Filed in court deft's memorandum in support of motion to dismiss.
Dec. 21–66	Filed in court pltff's reply memorandum.
Dec. 21–66	Filed in court pltff's memorandum.
Dec. 27–66	Filed memorandum Opinion #33086—pltff's motion for declaratory judgment & for prel injunction are denied without prejudice—& deft's motion to dismiss the complaint is granted—So Ordered—Cannella, J M/N.
Jan. 4–67	Filed pltff's notice of appeal—mailed copies to Leon Mendelson; Commr. Arnold G. Fraiman & J. Lee Rankin.
Dec. 21–66	Filed affdvt. of Leonard B. Boudin (filed in court).

Docket Entries for the Court of Appeals

Date	Proceedings
Jan. 4. 67–	Filed record (original papers of District Court)
Feb. 2. 67–	Filed order extending time to file appellants' brief and joint appendix to Feb. 17, 1967
Feb. 17. 67–	Filed joint appendix
Feb. 17. 67–	Filed brief, appellants'
Mar. 9. 67–	Filed brief, appellees'
Mar. 22. 67–	Filed reply brief, appellants'
Mar. 23. 67–	Argument heard (by: Moore, Hays, CJJ and Dooling, DJ)
July 13, 67–	Filed order permitting appellants to submit additional material and appellees to reply
July 27, 67–	Filed supplemental memorandum, appellants'
Aug. 17, 67–	Filed supplemental memorandum, appellees'
Sept. 20, 67–	Judgment Affirmed, Hays, CJ
Sept. 20, 67–	Filed judgment
Sept. 26, 67–	Certified appendix and proceedings to Rabinowitz & Boudin, Esqs.
Oct. 6, 67–	Issued Mandate (opinion and judgment)
Nov. 17, 67–	Filed notice of filing of petition for writ of certiorari
Feb. 6, 68–	Filed certified copy of order of Supreme Court granting petition for writ of certiorari

Summons

(R. p. 97)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 4307

[SAME TITLE]

To the above named Defendants:

You are hereby summoned and required to serve upon Rabinowitz & Boudin, plaintiff's attorneys, whose address is 30 East 42nd Street, New York, N. Y. 10017, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JOHN J. OLEAR, JR.,
Clerk of Court.

HARRY C. KREINIK,
Deputy Clerk.

[Seal of Court]

Date: Dec. 14, 1966.

Complaint for Declaratory Judgment and Injunction

(R. pp. 1-10)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The plaintiffs by their attorneys, complaining of the defendants, allege:

1. The Court has jurisdiction of this action under Article 1, § 10 of the United States Constitution, under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution; under § 605 of the Federal Communications Act of June 19, 1934, 47 U.S.C. § 605, 48 Stat. 1103; and under 42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 1337, 1343, 2201 and 2202.

2. The plaintiff, Uniformed Sanitation Men Association, Inc. (herein "the Union") is a labor union incorporated under the laws of the State of New York, and known generally as Uniformed Sanitationmen's Association, Local 831, I.B.T. Its principal office is at 25 Cliff Street in the Borough of Manhattan, City of New York.

3. The Union is the collective bargaining agent of the approximately 10,000 sanitationmen employed by the Department of Sanitation in the City of New York, having been certified as such on August 5, 1958 by the Commissioner of Labor of the City of New York. Thereafter, in November 1965, the Union entered into a collective labor bargaining agreement with the City of New York on behalf of the said employees, which agreement established their

terms and conditions of employment, effective July 1, 1965; the said agreement is presently in effect.

4. Each of the following individual plaintiffs is a citizen of the United States and is a member of and duly represented by the Union, is a sanitationman with tenure as a classified civil service employee under the New York Civil Service Law and is and has been employed by the City of New York in the Department of Sanitation for the period specified below:

Name	*Years Employed*
Anthony Calabrese	36
Nunzio Chierico	13
Joseph Miranda	13
Michael A. Mango	16
Peter I. Lombardo	18
John Alessio	15
James Minter	11
Nicholas J. Caruso	17
Anselmo Quinones	14
Marcus F. King	16
Philip D'Agostino	18

5. Each of the following individual plaintiffs is a citizen of the United States, has tenure as a classified civil service employee under the New York Civil Service Law, and is and has been employed by the City of New York in the Department of Sanitation for the period of time set forth below and is presently employed in the supervisory capacity indicated:

Name	*Years Employed*
Bernard F. Bellettiere, Foreman	18
August Mascia, Asst. Foreman	22
Joseph M. Barbara, Asst. Foreman	36
Anthony D'Ambrosio, Asst. Foreman	23
Leonard Monteleone, Asst. Foreman	24

6. The defendant, Commissioner of Sanitation of the City of New York, is the head of the Department of Sanitation of that city under § 752 of the New York City Charter, with supervisory power over the department's employees under § 752-6.0 of the Administrative Code of the City of New York; the defendant, Commissioner of Investigation of the City of New York, is the head of the Department of Investigation of that city under § 801 of the said Charter with the duty of conducting any investigation directed by the Mayor or City Council, or which in the Commissioner's opinion may be in the best interests of the city; and the defendant, City of New York, is a municipal corporation which employs the individual plaintiffs herein. Each of the said defendants has his or its principal place of business in the Southern District of New York.

7. None of the plaintiffs has ever been convicted of crime; the plaintiffs James D. Minter, August Mascia, Marcus F. King, Leonard Monteleone, Joseph Miranda, Peter I. Lombardo, Joseph Alessio, Michael A. Mango, Bernard F. Bellettiere and Anselmo Quinones served and received honorable discharges during the second World War in the military forces of the United States, the last three named now being disabled war veterans presently receiving federal disability benefits.

8. In November 1966, each of the individual plaintiffs was directed by the Commissioner of Investigation to appear at hearings before him at which time each of them was put under oath and interrogated by the Commissioner. Each of them, except the plaintiffs Anthony Calabrese, Anthony D'Ambrosio and Leonard Monteleone, declined to respond, relying on his privilege against self-incrimination guaranteed him by the federal and state Constitutions; the plaintiff John L. Alessio not being competent to answer the questions, also declined to respond.

9. The investigation conducted by the Commissioner of Investigation was the result of, and was accompanied by, the interception and divulging of telephone conversations to which the individual plaintiffs were parties, without the consent of the senders thereof.

10. At the hearings involving the individual plaintiffs Michael A. Mango, Bernard F. Bellettiere, James D. Minter, August Mascia, Anselmo Quinones, Joseph Barbara, Anthony Calabrese and Joseph Miranda, the Commissioner of Investigation played what he described as recordings of telephone conversations between the said individual plaintiffs, other employees of the Department of Sanitation, and other persons; at the hearings involving Joseph M. Barbara, Marcus F. King, Nunzio Chierico and Peter I. Lombardo, the Commissioner of Investigation stated directly and by implication, that such recordings had been made and were in his possession.

11. Thereafter, on or about December 2, 1966, the Commissioner of Sanitation notified the individual plaintiffs who had asserted their constitutional privilege against self-incrimination that they were suspended immediately without pay for that reason; and the Commissioner notified the individual plaintiffs, Anthony Calabrese, Anthony D'Ambrosio, Leonard Monteleone and John L. Alessio, that they were suspended without pay by reason of "information received from the Commissioner of Investigation concerning irregularities arising out of your employment in the Department of Sanitation."

12. The defendants' action, including the suspension from duty without pay of the individual plaintiffs and their prospective dismissals from employment under § 1123 of the New York City Charter for their assertion of their constitutional privilege against self-incrimination, are unlawful in that:

a) they violate the said plaintiffs' rights to due process under the Fourteenth Amendment to the Constitution of the United States;

b) they violate the plaintiffs' federal constitutional privilege against self-incrimination as set forth in the Fifth Amendment to the Constitution of the United States and as incorporated into the Fourteenth Amendment to the Constitution;

c) they deprive the plaintiffs under color of the City Charter of the rights, privileges and immunities secured to them by the Constitution of the United States.

13. Upon information and belief, the investigation conducted by the Commissioner of Investigation, described in paragraph 9 above, was in violation of §§ 501 and 605 of the Communications Act of 1934, 47 U.S.C. §§ 501, 605, the Regulations, Orders and Decisions of the Federal Communications Commission, and said acts violated the individual plaintiffs' rights under the Fourth and Fourteenth Amendments to the United States Constitution against unreasonable searches and seizures and against invasions of their privacy.

14. Section 1123 of the New York City Charter is repugnant to the guarantee of due process and to the privilege against self-incrimination provided in the Fifth and Fourteenth Amendments to the United States Constitution, and abridges the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States.

15. With respect to each one of the plaintiffs, the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs.

16. The plaintiffs have exhausted their administrative remedies.

17. The defendants' action have caused, are causing and will continue to cause the plaintiffs irreparable injury for which they have no adequate remedy at law.

WHEREFORE, the plaintiffs pray for a judgment

1. Declaring that

(a) Section 1123 of the New York City Charter and the suspension of the individual plaintiffs and their prospective hearings and discharges under the said Charter provision, are in violation of the individual plaintiffs' federal privilege against self-incrimination guaranteed by the Fifth Amendment to the Constitution of the United States, as incorporated in the Fourteenth Amendment to the said Constitution;

(b) The said Charter mandate of the dismissal of employees for assertion of their federal constitutional privilege against self-incrimination, and, as construed by the defendants for their immediate suspension from employment, abridges the privileges and immunities of the individual plaintiffs as citizens of the United States in violation of § 1 of the Fourteenth Amendment to the Constitution of the United States;

(c) The said Charter provision authorizing the suspension and dismissal from employment for assertion of the privilege deprives the plaintiff employees of their liberty and property without due process in violation of § 1 of the Fourteenth Amendment to the Constitution of the United States;

(d) The said Charter provision authorizing the suspension of said employees from their employment by rea-

son of their assertion of constitutional privilege denies the individual employees the equal protection of the laws to which they are entitled under § 1 of the Fourteenth Amendment to the Constitution of the United States in that the Charter provision arbitrarily and indiscriminately denies municipal employees the exercise of their constitutional rights as a condition to retaining employment;

(e) The said investigation by the Department of Investigation and the suspensions from employment of the individual plaintiffs by the Commissioner of Sanitation and his prospective discharges of the individual plaintiffs are in violation of §§ 501 and 605 of the Federal Communications Act, 47 U.S.C. §§ 501, 605, 48 Stat. 1103, and are the result of an unlawful search and seizure in violation of the Fourth Amendment as incorporated into the Fourteenth Amendment and in violation of the individual plaintiffs' right to privacy under the First, Fourth and Ninth Amendments to the Constitution of the United States.

2. Enjoining the defendants permanently and during the pendency of this action from continuing to engage in the interception, divulging, recording and publication of telephone conversations among the plaintiffs or between the plaintiffs and other persons.

3. Enjoining the defendant Commissioner of Sanitation permanently and during the pendency of this action, from:

(a) Continuing the suspensions from employment of the individual plaintiffs, conducting any further investigation or hearings and issuing any charges based, in whole or in part, directly or indirectly, upon the individual plaintiffs' assertion of their constitutional privilege against self-incrimination or based upon the aforesaid intercep-

tion, divulgence, recording or publication of telephone conversations.

4. Directing the defendants Commissioner of Sanitation and the City of New York to restore the individual plaintiffs forthwith to their employment with full back pay to the date of their suspension, and to take all necessary steps to restore to them as of the date of their suspension all of their benefits, privileges and prerogatives, including those relating to retirement and pensions, hospitalization insurance and health insurance; and for such other and further relief as may be just and proper.

RABINOWITZ & BOUDIN
By LEONARD B. BOUDIN,
Member of the Firm,
30 East 42nd Street,
New York, N. Y.

MORRIS WEISSBERG,
15 Park Row,
New York, N. Y. 10038.

JOHN J. DELURY, JR.,
15 Park Row,
New York, N. Y. 10038.

Attorneys for Plaintiffs.

Order to Show Cause on Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

(R. pp. 34-96)

[SAME TITLE]

Upon the summons and complaint herein, and upon the annexed affidavit of John J. DeLury, sworn to December 14, 1966; Leonard Monteleone, sworn to December 8, 1966; August Mascia, sworn to December 9, 1966; Joseph Miranda, sworn to December 8, 1966; Nunzio Chierico, sworn to December 8, 1966; Bernard F. Bellettiere, sworn to December 8, 1966; Nicholas J. Caruso, sworn to December 8, 1966; Anselmo Quinones, sworn to December 9, 1966; Anthony Calabrese, sworn to December 9, 1966; James D. Minter, sworn to December 9, 1966; Marcus F. King, sworn to December 9, 1966; Joseph Barbara, sworn to December 8, 1966; Peter I. Lombardo, sworn to December 8, 1966; Philip D'Agostino, sworn to December 8, 1966; Anthony D'Ambrosio, sworn to December 8, 1966; John L. Alessio, sworn to December 12, 1966; and Michael A. Mango, sworn to December 9, 1966.

LET the defendants show cause before this Court at a civil motion part thereof, to be held in Room 506 of the United States Courthouse, Foley Square, New York, N. Y., on the 20th day of December, 1966 at 10:30 a.m. why an order should not be granted:

A. Enjoining the defendant Commissioner of Investigation and all persons acting in concert with him, during the pendency of this action,

Order to Show Cause on Plaintiffs' Motion

(1) from continuing to intercept, record, divulge or publish telephone conversations to which any of the plaintiffs herein were or are parties,

(2) from conducting any investigation based upon information directly or indirectly obtained by means of the interception, recording, divulging or publishing of telephone conversations to which any of the plaintiffs herein were or are parties.

B. Enjoining the defendant Commissioner of Sanitation, during the pendency of this action,

(1) from continuing the suspensions from employment of the individual plaintiffs,

(2) from conducting any investigation or hearing and from issuing any charges based in whole or in part upon the assertion by the individual plaintiffs of their constitutional privilege against self-incrimination or based in whole or in part upon information obtained by intercepting, recording, divulging or publishing of telephone conversations to which any of plaintiffs were parties.

C. Directing the defendants to appear for oral examination with respect to the issues in this case pursuant to Rules 26 and 30 of the Federal Rules of Civil Procedure, and directing the defendants, pursuant to Rule 34 of the Federal Rules of Civil Procedure, to produce and permit the inspection and copying of (i) all recordings of telephone conversations to which any of the plaintiffs were parties, made by or in the possession of any of the defendants, (ii) transcripts of the interviews or hearings conducted by the Commissioner of Investigation with respect to the individual plaintiffs herein, and (iii) all communications between the Commissioner of Investigation and other persons or agencies concerning the investigation conducted by the Commissioner of Investigation, the assertion by

any of the plaintiffs of their constitutional privilege against self-incrimination, and the interception of telephone conversations to which any of the plaintiffs were parties.

D. Granting such other and further relief as the Court may deem just and proper.

LET the defendants further show cause why, upon the return of this motion, a temporary restraining order should not be made in open court:

A. Restraining the Commissioner of Sanitation, pending the determination of this motion, from continuing the suspension of the individual plaintiffs and from conducting any hearing upon charges based upon their assertion of their constitutional privilege against self-incrimination, or upon any information obtained as a result of intercepting and divulging of any telephone conversations to which any of the plaintiffs were parties.

B. Enjoining the Commissioner of Investigation, pending the determination of this motion, from intercepting or divulging the contents of any conversations to which any of the plaintiffs were or may be parties.

Sufficient reason appearing therefor, service of this order and the papers upon which it is based upon each of the defendants, by leaving a copy thereof with the persons in charge of each of their offices, on or before the 15th day of December, 1966, shall be deemed good and sufficient service.

Dated: December 14, 1966.

EDMUND L. PALMIERI,
U. S. D. J

Affidavit of John J. De Lury, Read in Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JOHN J. DE LURY, being duly sworn, deposes and says:

1. I am the President of Uniformed Sanitation Men Association, Inc., a labor union incorporated under the laws of the State of New York and known generally as Uniformed Sanitationmen's Association, Local 831, IBT.

2. The Union is the collective bargaining agent of the sanitationmen employed by the Department of Sanitation of the City of New York, numbering approximately 10,000, and was certified as such on August 5, 1958 by the Commissioner of Labor of the City of New York.

3. In November 1965 the Union entered into a collective bargaining agreement with the City of New York on behalf of the said employees, establishing their terms and conditions of employment effective July 1, 1965. A copy of the said agreement, which is presently in effect, is annexed hereto as Exhibit A.

4. As collective bargaining agent, the Union represents the eleven individual plaintiffs named in paragraph

4 of the complaint, all of whom are sanitationmen employed in the Department of Sanitation for periods ranging from thirteen to thirty-six years. These men are members of the Union with tenure as civil service employees under the State Civil Service Law; most of them are war veterans with honorable discharges from the United States Army; all of them are married and many have children dependent upon them for support; none of them, so far as I am aware, has ever been convicted for crime.

5. The five individual plaintiffs named in paragraph 5 of the complaint include one foreman and four assistant foremen. They have been employed in the Department of Sanitation by the City of New York for periods ranging from sixteen to thirty-six years. Each of them, too, has tenure under the State Civil Service Law; several are war veterans with honorable discharges, as appears from the complaint; all of them are married and have families dependent for support upon them; none of them, so far as I know, has any criminal record. The Union is directly concerned with their welfare and with their constitutional rights since these rights have been violated in the course of the same investigation and in precisely the same manner as the Union members involved in this action.

6. On November 22, 23 and 28, 1966, the Commissioner of Investigation of the City of New York directed all of the individual plaintiffs to appear before him, put them under oath, and interrogated them, as appears in the annexed affidavits of these plaintiff employees. The Commissioner indicated to several of them that he had recordings of their telephone conversations; in a number of instances he played back to them tapes of their alleged telephone conversations with one another and with other persons. I am advised by counsel and believe that this was a violation of § 605 of the Federal Communications Act of 1934.

7. It further appears from the annexed affidavits that twelve of the individual plaintiff employees declined to answer a number of questions on the ground of their constitutional privilege against self-incrimination which, I am advised, is guaranteed to them by the Fifth and Fourteenth Amendments to the Constitution of the United States. I am further advised that four plaintiff employees did answer questions, as appears from their affidavits, although I have reason to believe that one of them, John Alessio, who has a record of psychological illness, did not understand what was happening at the time of the hearing before the Commissioner.

8. Following the hearings and on December 2, 1966 or shortly thereafter, each of the individual plaintiff employees was notified by the Commissioner of Sanitation that he was suspended from his employment without pay as a result of the hearings before the Commissioner of Investigation. The letter of notification which was sent to twelve employees explicitly stated that the suspension was pursuant to § 1123 of the New York City Charter and was because

> "you invoked your constitutional privilege against self-incrimination and refused to answer any questions relating to your duties and employment in the Department of Sanitation on the ground that the answers thereto would tend to incriminate you."

The letter was in the form attached to the affidavit of Joseph Miranda, one of the plaintiff employees.

9. The remaining four employees, those who did not assert their constitutional privilege, were suspended upon the basis of

"information received from the Commissioner of Investigation concerning irregularities out of your employment in the Department of Sanitation."

A copy of the letter sent to those plaintiff employees is annexed to the affidavit of Anthony Calebrese.

10. I am advised and believe that the suspension of each one of the individual plaintiff employees is unlawful because, as appears above, it was the result of an investigation by the Commissioner of Investigation based upon and accompanied by the interception and divulging of telephone conversations by the said Commissioner and his agents, all in violation of § 605 of the Federal Communications Act of 1934. It may be that such interception and divulging may also have been in violation of the laws of the State of New York, but that is a matter which will have to be determined through depositions or at a hearing.

11. It also appears that with respect to twelve individual plaintiff employees, the suspensions are unlawful because they are concededly predicated upon the assertion of the individuals' constitutional privilege against self-incrimination which, I am advised, is guaranteed them by the Fifth and Fourteenth Amendments to the United States Constitution.

12. The injury to the individual plaintiffs is substantial and irreparable. After long employment, decades in some cases, in the only field in which they are experienced, they are now cast off, without work and without the wages which they need to support their families. Their pension, retirement, medical and hospitalization benefits are all in jeopardy; indeed, in the event of hospitalization, and one such instance has just arisen, the termination of payroll deductions has now resulted in termination of medical

and hospitalization coverage. This is a severe blow for a working man.

13. Nor is it realistic to assume that they can go out and easily secure other employment. The plaintiffs are now under a cloud in view of the widespread publicity that was given to their suspension by the defendants. A typical story is the story on page 1 of the New York Times of December 3, 1966, a copy of which is annexed hereto as Exhibit B.

14. This publicity, whose propriety I seriously question, as well as the letters of suspension stigmatizes the individual plaintiff employees as persons who invoked their privilege against self-incrimination and who have been charged with "irregularities" in their employment.

15. I am advised that it is the intention of the Commissioner of Sanitation to conduct hearings upon charges shortly to be served upon each of the individual plaintiffs. I am further advised that the hearings in the cases of those who asserted their constitutional privilege against self-incrimination will be predicated upon the assertion of that privilege, and in the cases of the other individual plaintiffs, the Commissioner of Sanitation intends to conduct a hearing for the purpose of establishing "irregularities."

16. The hearings in the cases involving the assertion of the privilege against self-incrimination are necessarily pro forma hearings in view of the fact that § 1123 of the New York City Charter provides for the automatic dismissal from employment of city employees who invoke that privilege. I am advised, that the predecessor section of the New York City Charter, § 903, which is in substantially identical language, has been construed author-

itatively by the Courts of Appeals of the State of New York to mean that the position of a city employee is vacated immediately and automatically upon the invocation of the privilege. Since the individual plaintiff employees do not deny that they asserted their constitutional privilege against self-incrimination, there is nothing to be tried in any subsequent hearings before the Commissioner of Sanitation.

17. The situation with respect to those plaintiff employees who did not assert the privilege is somewhat different. The investigation, the suspensions and the prospective hearings, and the possible dismissal from employment are clearly predicated upon information obtained by widespread wiretapping in violation of both the federal statute and the United States Constitution. If, as is claimed, plaintiffs' rights have been violated, then the investigation, the suspensions and the hearings are unlawful.

18. There is no administrative remedy available to the plaintiffs in this action. Those persons who asserted the constitutional privilege are automatically barred by § 1123 of the Charter, and the Commissioner of Sanitation does not have the power to rewrite the New York City Charter. Likewise, if as it claimed, the wiretapping of the individual plaintiffs' telephone conversations was a violation of the federal statute and Constitution, then the only remedy lies in this action.

19. The individual plaintiffs have suffered and will continue to suffer substantial and irreparable injury. The issues, at least with respect to the constitutional privilege, are exclusively those of law, and the same is apparently true with respect to the wiretapping issue. The plaintiffs therefore seek a preliminary injunction against the con-

tinuance of the suspensions for the assertion of the privilege and the continuance of any suspensions based upon illegal wiretapping. The plaintiffs also seek a preliminary injunction against administrative hearings and any disciplinary action based upon such violations of law by defendants.

20. The plaintiffs will also need a temporary restraining order against the unlawful activities described in the event that the motion for a preliminary injunction is not decided at the time of oal argument.

21. The second part of the relief sought upon the instant motion is an order directing the defendants to appear for oral examination under Rule 30 of the Federal Rules of Civil Procedure to testify with respect to the two issues in this case: (a) the assertion of the constitutional privilege; and (b) the wiretapping. These matters are directly material to the issue raised by the complaint and it is important for the plaintiffs to establish the details, the mechanics and the substance of the wiretapping for the purpose of establishing not only the violations of law, but for the purpose of showing the connection between those violations of law and the investigation, suspension and potential dismissals from employment of the individual plaintiffs.

22. The plaintiffs also seek an order requiring the defendants to produce and permit the inspection, copying and reproducing of the recordings or transcripts thereof of the telephone conversations of the individual plaintiffs, of the transcripts of the hearings by the Commissioner of Investigation, and all communications between the Commissioner of Investigation and other persons concerning these subjects.

23. The transcripts of the hearings were requested by the Union's counsel, Leonard B. Boudin, Esq. of Rabinowitz & Boudin, who were retained by the Union to institute this litigation. Copies of Mr. Boudin's letters to the Commissioner of Investigation and to the Commissioner of Sanitation are annexed hereto as Exhibits C and D. I am advised by Mr. Boudin that he talked to both Commissioners Kearing and Fraiman, and that their position is best reflected in the letter of Commissioner Fraiman to Mr. Boudin, a copy of which is annexed hereto as Exhibit E, in which the immediate delivery of the transcripts was refused but in which it was promised that certain of them would be delivered to some of the plaintiff employees upon the receipt of charges and notice of hearing upon those charges from the Commissioner of Sanitation.

24. This motion is brought on by order to show cause because it is necessary to take swift action to protect the rights of these plaintiff employees. There is a need to take the depositions quickly in order to ventilate all of the relevant facts necessary for the prosecution of this action and because further prejudicial administrative action by defendants is likely to be imminent.

25. An order to show cause is also necessary because the plaintiffs require an order at the present time directing the defendants to produce the documents and recordings for use upon the motion for a preliminary injunction and for use upon the application for a temporary restraining order.

26. No prior application for this relief has been made to any court or to any judge.

/s/ JOHN J. DE LURY

(Sworn to December 14, 1966.)

Exhibit A, Annexed to Foregoing Affidavit

THIS INDENTURE made the day of November 1965 between the City of New York, hereinafter referred to as the "First Party", and the undersigned, all Sanitation Men, employed in the Department of Sanitation, City of New York hereinafter referred to as the "Second Party".

WITNESSETH:

WHEREAS, The First Party was and still is a municipal corporation organized under the Laws of the State of New York, and

WHEREAS, the Second Parties were and still are employed by the First Party under the title of Sanitation Man, and

WHEREAS, certain differences between the parties have arisen with respect to rates of wages and other perquisites in the locality of the City of New York; and

WHEREAS, it is the desire of the parties herein to compromise their differences by the acceptance of certain annual or daily rates of pay and perquisites to be paid to the Second Parties both retroactively and prospectively for the affected period in full settlement of services rendered and to be rendered;

NOW, THEREFORE, IT IS MUTUALLY AGREED AS FOLLOWS:

1. The First Party agrees to employ each of the Second Parties signatory to this agreement for the period between July 1, 1965 and June 30, 1966 for 261 (8 hour) working days at the respective annual compensations set forth in Schedule "A" attached hereto.

2. It is hereby agreed, that annual salary adjustments as enumerated in Schedule "A" attached hereto shall ac-

arue from the date of appointment or reinstatement of each of the Second Parties and shall be payable on the regular first pay period following the annual anniversary date of such appointment or reinstatement.

3. The First Party also agrees to compensate any of the Second Parties signatory to this agreement for the period as indicated between July 1, 1965 and June 30, 1966, for services rendered and to be rendered as follows:

EFFECTIVE JULY 1, 1965

a. *Sunday Work*—to be paid for at time and one-half (1½) the respective pro-rated daily rate.

b. *Snow Removal Activities*—in accordance with the respective budget certificates relating thereto; it being understood that, should any of the Second Parties be required to report for legal emergencies and/or snow work, on other than his regularly scheduled tours, he shall be guaranteed and paid a minimum of eight (8) hours pay at time and one-half (1½) the pro-rated daily rate if he reports for such work.

c. *Holiday Work*—in addition to the compensations referred to in paragraph "1" and Schedule "A" herein, the First Party hereby also agrees to provide additional payment to each signatory Second Party of one and one-half (1½) days pay for each (8 hour) day actually worked by him on the following holidays:

New Year's Day	Labor Day
Lincoln's Birthday	Columbus Day
Washington's Birthday	Election Day
Decoration Day	Veterans' Day
Independence Day	Thanksgiving Day
	Christmas Day

Exhibit A

d. *Night Differential*—in addition to all other compensations referred to in paragraph "1" and Schedule "A" herein, the First Party agrees to pay to each affected Second Party the sum not to exceed $1.00 per night when required actually to work a night shift. For these purposes a night shift shall be any shift in which four (4) or more hours of the shift fall after 3:00 P.M., except, that work performed on snow removal for which additional compensation is provided in accordance with paragraph 3.b above and for which additional compensation is also provided in accordance with paragraphs 3.a and 3.c above, and all other excused or unexcused absences with or without pay shall be excluded from this provision.

e. *Benefits Fund*—the First Party further agrees during the term of this agreement to provide a sum not to exceed an annual amount of $159 for each incumbent Second Party, or the pro-rata share thereof, for each Second Party employed as a Sanitation Man during the term of this agreement for a period less than the full term of this agreement, for the purpose of furnishing, as provided in the annexed agreement hereinafter referred to, certain supplementary benefits for the period of employment of such signatory by the City during the term of this agreement as defined in the annexed separate agreement entered into between the City of New York and the Uniformed Sanitationmen's Association. The payments as above indicated shall be remitted by the First Party to the Uniformed Sanitationmen's Association Security Benefits Fund subject to the annexed separate agreement entered into between the City of New York and the Uniformed Sanitationmen's Association for the benefit of each incumbent Second

Exhibit A

Party signatory to this agreement and further subject to periodic audit by the Comptroller of the City of New York.

f. *Hospitalization Coverage*—The First Party hereby further agrees, effective July 1, 1965 through December 31, 1965 to the continued assumption by the First Party of the total payment for hospital insurance only, on a category basis, for each signatory Second Party for such or equivalent hospitalization coverage only as is currently provided by the First Party under HIP-Blue Cross (21-day Plan) category basis.

In addition, thereto, the First Party further agrees effective July 1, 1965 through December 31, 1965 to continue to provide payment for hospitalization coverage as above indicated for each signatory Second Party, who may retire on or after January 1, 1965, with the following provisos:

a—That this hospitalization coverage shall be applicable to the retiree on a category basis at the time of his retirement and shall be limited to only those dependents covered at the time of his retirement.

b—That this hospitalization coverage shall be applicable only if the retiree is not otherwise gainfully employed on a more than half-time basis.

c—That this hospitalization coverage shall not be applicable if the retiree is in any way otherwise covered by similar hospitalization insurance after retirement.

EFFECTIVE JANUARY 1, 1966

g. *Health and Hospitalization Coverage*—The First Party hereby further agrees, effective January 1, 1966, to the assumption by the First Party of full payment for choice of health and hospital in-

surance, not to exceed 100% of the full cost of HIP-Blue Cross (21-day Plan), on a category basis, for each signatory Second Party.

In addition thereto, the First Party further agrees, effective January 1, 1966 to provide payment for health and hospitalization coverage as above indicated for each Second Party, who may retire on or after January 1, 1965, with the following provisos:

a—That this health and hospitalization coverage shall be applicable to the retiree on a category basis at the time of his retirement and shall be limited to only those dependents covered at the time of his retirement.

b—That this health and hospitalization coverage shall be applicable only if the retiree is not otherwise gainfully employed on a more than half-time basis.

c—That this health and hospitalization coverage shall not be applicable if the retiree is in any way otherwise covered by similar health and hospitalization insurance after retirement.

4. The First Party agrees to provide to each of the Second Parties signatory to this agreement, a uniform allowance as indicated in Schedule "A" attached hereto and pursuant to provisions of the appropriate certificate of the Budget Director in addition to all other allowances hereinbefore provided.

5. It is also understood and agreed that the terms and conditions of employment of each of the Second Parties, in addition to the annual compensations and other perquisites referred to in paragraphs "1" to "4" and Schedule "A" inclusive hereof, shall include pension, sick leave and vacation with pay benefits (each more fully described below).

Exhibit A

It is also agreed, that sick leave and/or line of duty injury benefits shall be granted to signatories of this agreement, in accordance with Chapter 551 of the Laws of 1962 (New York State).

The First Party further agrees to grant to each signatory Second Party an annual vacation allowance of 25 days, and continue to grant terminal leave of one (1) month for every ten (10) years of service prior to retirement.

It is further understood and agreed between the parties herein that such working conditions and other perquisites not specifically enumerated herein shall be in conformity with a memorandum of understanding covering such working conditions and perquisites agreed to between the Department of Sanitation and the duly designated Union, the Uniformed Sanitationmen's Association, as representatives of the Second Parties as certified by the Commissioner of Labor of the City of New York.

6. It is further understood and agreed between the parties herein that the pension adjustment to provide for the increased take home pay provided for by the terms of Executive Order No. 146 dated June 18, 1965 shall be continued for each of the Second Parties signatory to this agreement, effective July 1, 1965.

7. Simultaneously with the approval of the terms and conditions of this agreement by the Mayor of the City of New York, each of the Second Parties hereby agrees to execute and deliver to the City of New York his general release.

EFFECTIVE JANUARY 1, 1966

g. *Health and Hospitalization Coverage*—The First Party hereby further agrees, effective January 1, 1966, to the assumption by the First Party of

full payment for choice of health and hospital insurance, not to exceed 100% of the full cost of HIP-Blue Cross (21-day Plan), on a category basis, for each signatory Second Party.

In addition thereto, the First Party further agrees, effective January 1, 1966 to provide payment for health and hospitalization coverage as above indicated for each Second Party, who may retire on or after January 1, 1965, with the following provisos:

a—That this health and hospitalization coverage shall be applicable to the retiree on a category basis at the time of his retirement and shall be limited to only those dependents covered at the time of his retirement.

b—That this health and hospitalization coverage shall be applicable only if the retiree is not otherwise gainfully employed on a more than half-time basis.

c—That this health and hospitalization coverage shall not be applicable if the retiree is in any way otherwise covered by similar health and hospitalization insurance after retirement.

4. The First Party agrees to provide to each of the Second Parties signatory to this agreement, a uniform allowance as indicated in Schedule "A" attached hereto and pursuant to provisions of the appropriate certificate of the Budget Director in addition to all other allowances hereinbefore provided.

5. It is also understood and agreed that the terms and conditions of employment of each of the Second Parties, in addition to the annual compensations and other per-

quisites referred to in paragraphs "1" to "4" and Schedule "A" inclusive hereof, shall include pension, sick leave and vacation with pay benefits (each more fully described below).

It is also agreed, that sick leave and/or line of duty injury benefits shall be granted to signatories of this agreement, in accordance with Chapter 551 of the Laws of 1962 (New York State).

The First Party further agrees to grant to each signatory Second Party an annual vacation allowance of 25 days, and continue to grant terminal leave of one (1) month for every ten (10) years of service prior to retirement.

It is further understood and agreed between the parties herein that such working conditions and other perquisites not specifically enumerated herein shall be in conformity with a memorandum of understanding covering such working conditions and perquisites agreed to between the Department of Sanitation and the duly designated Union, the Uniformed Sanitationmen's Association, as representatives of the Second Parties as certified by the Commissioner of Labor of the City of New York.

6. It is further understood and agreed between the parties herein that the pension adjustment to provide for the increased take home pay provided for by the terms of Executive Order No. 146 dated June 18, 1965 shall be continued for each of the Second Parties signatory to this agreement, effective July 1, 1965.

7. Simultaneously with the approval of the terms and conditions of this agreement by the Mayor of the City of New York, each of the Second Parties hereby agrees to execute and deliver to the City of New York his general release.

Exhibit A

8. The rates and other perquisites referred to in this agreement are not to be construed as rate fixations of prevailing wages under Section 220 of the Labor Law, the same having been agreed upon in compromise for the purpose of effectuating the settlement of disputes between the parties herein.

9. Upon execution and approval of this agreement, each of the Second Parties agrees to:

a—Withdraw any and all of his claims and complaints, if any, heretofore filed under Section 220 of the Labor Law;

b—refrain from filing similar claims or complaints, for the period from July 1, 1965 to June 30, 1966; and

c—waive his rights to receive prevailing rates of wages in proceedings either initiated or which hereafter may be initiated under the Labor Law during the effective period of this agreement;

d—discontinue any and all actions and/or Article 78 proceedings in any court heretofore commenced by him or on his behalf;

e—waive any and all rights and remedies with respect to wage supplements now provided by Chapter 750 of the Laws of 1956 except as herein otherwise provided, for the effective period of this agreement.

10. The terms and conditions of this agreement shall be subject to approval of the Mayor of the City of New York.

otherwise the same shall be of no force and effect whatever.

THE CITY OF NEW YORK

By: .....
Budget Director, First Party

.....
Second Party

.....
Second Party

(SCHEDULE "A" 1965-1966)

SANITATION MAN

Annual Rate on June 30, 1965 Prior to Revision	July 1, 1965 Min.–$5,974 Max.–$7,506	Anniversary Date after July 1, 1965	Salary Adjustment
$5,544	$5,974	$6,485	$511
5,642	6,072	6,583	511
6,055	6,485	6,996	511
6,437	6,867	7,378	511
6,566	6,996	7,506	510
7,076	7,506	—	—

Annual Uniform Allowance = $115

Appointed on or after July 1, 1965

Appointment Rate	$5,974	—
After one year service	6,485	511
After two year service	6,996	511
After three year service	7,506	510

Exhibit B, Annexed to Foregoing Affidavit

NEW YORK TIMES

SATURDAY, DECEMBER 3, 1966

18 EMPLOYES SUSPENDED IN NEW SANITATION SCANDAL

By ROBERT E. DALLOS

The Sanitation Department suspended 18 employees yesterday in the second scandal uncovered in the department in less than two months. Investigation Commissioner Arnold G. Fraiman said the men had split up to $500 a day in cash payments from private companies who dumped garbage at the city-owned East 91st Street Marine Transfer Station. The scheme, he said, cost the city $350,000 a year and had been going on since 1949.

Private companies are supposed to buy tickets from the Sanitation Department to turn in when they dump commercial refuse at any of 24 city facilities.

Mr. Fraiman said the men—the 91st Street station's entire crew—often accepted half the charge for a load in cash instead of taking the full charge in tickets. That way the companies saved money on their dumping costs and the employes pocketed the cash, he said.

PROSECUTOR TO GET DATA

Mr. Fraiman said the results of the investigation, which began in September, would be turned over to the district attorney for possible criminal prosecution.

The carting companies, Mr. Fraiman said, could be charged with "perhaps larceny" in any illegal payment of fees to city employes. Any charges against the employer would be up to the district attorney, he added.

Exhibit B

John J. DeLury, president of the Uniformed Sanitationmen's Association, said the charge that the alleged practice dated back to 1949 was "a lot of malarkey." He put the blame for the scandal on what he said were Mayor Lindsay's "incredibly inept appointments" of key officials of the department.

Mr. DeLury ordered the department's 10,000 union members to refuse to handle unsafe equipment and to observe all safety rules and regulations.

The resulting "massive slow-down," which the union president said would begin to cause a backlog of garbage collections by Monday, "was motivated and related to" the city's action in the situation.

Mr. DeLury was also strongly critical of Thursday's appointment by Sanitation Commissioner Samuel J. Kearing Jr. of Edgar D. Croswell as the department's inspector general.

He called the appointment of the state police captain, who led the 1957 Apalachin raid against underworld leaders; a "slur on the Italian membership in the department."

The union leader said he had received telephone calls from his members and their wives protesting the appointment.

Noting that of the 14,000 sanitation men, about 85 per cent are of Italian descent, Mr. Delury said: "Why bring Captain Croswell here to look for Mafia members in every [Department] district?"

KEARING'S EXPLANATION

In reply to Mr. DeLury's charges, Mr. Kearing said last night:

> "I don't think that any nationality is more involved in crime than any other. Captain Croswell was not appointed simply because he was involved

in the Apalachin raid. I was simply looking for the most professional and competent investigator with a solid police background that I could get."

But the commissioner, agreed with the union president that "we do have a large number of vehicles in need of repair and out of service; I share his concern for the welfare and safety of his men."

At his news conference yesterday, Mr. Fraiman sat next to Mr. Kearing.

The Investigation Commissioner said all but four of the 18 men had refused to answer any questions about the reported cash payments on grounds of self-incrimination. He said the 14 would be given a "pro forma" hearing by Mr. Kearing within 30 days and would then be automatically dismissed. He refused to identify which of the men had refused to answer questions. He also did not identify the carting companies.

The highest ranking of those suspended was foreman Bernard F. Bellettiere of 414 Avenue C, Brooklyn, who joined the department in 1948. He is 44 years old and gets $9,095 a year.

2 in Investigation Unit

Two of the suspended men, according to Mr. Fraiman, were members of the department's investigation unit assigned to the 91st Street station.

They are Frank G. Casale, 48, of 873 68th Street, Brooklyn, and Joseph Moschella, 40 of 666 Carroll Street, Brooklyn. Mr. Casale joined the department in 1949 and Mr. Moschella in 1952. Both draw the $7,506 salary of the sanitation man rating.

Mr. Fraiman said that besides often paying for half the cost of the refuse dumping, which normally cost between $6 and $28 depending on the size of the truck, the

private carting companies were also allowed to dump their refuse when the station was closed to others.

A Sanitation Department official said yesterday that during 1965 the city received $4,893,360 from the sale of 20,824 dumping-ticket books. The city operates 11 incinerators, nine marine transfer stations and six landfills, all but two of which are open for dumping by private companies.

At the 91st Street Station, garbage is dumped directly onto barges for transfer to landfill areas.

Mr. Fraiman said there was no evidence that similar payoffs to sanitation employes were being made at any other dumping stations. The current investigation, he said, was started after information was supplied to him by License Commissioner Joel J. Tyler.

In answer to a question, Mr. Fraiman declined to criticize the administration of former Mayor Robert F. Wagner for not having uncovered alleged long-standing irregularities in the Sanitation Department. Mr. Wagner could not be reached for comment last night.

At a news conference shortly after the Fraiman disclosures, Mayor Lindsay said that reports of a racket in dumping had been submitted to Mr. Wagner when he was Mayor. "But there is a big difference," Mr. Lindsay said, "between receiving reports of allegations and the commissioner's being able to prove them out, make arrests and report to the district attorney."

The Mayor added that he thought the only reason the alleged racket had not been "rooted out" earlier was lack of proof. "Around September," he said, "we got lucky and got the proof."

Mr. Fraiman said there was no connection between yesterday's charges and those made in October that more than 30 employes had paid $500 to $1,000 for promotions they had earned through Civil Service examinations. As

a result of that inquiry, First Deputy Commissioner Vincent A. Starace was dismissed from the Sanitation Department.

Mr. Kearing assumed the $30,000-a-year commissionership when Joseph P. Periconi resigned last month.

Assistant Foreman Anthony D'Ambrosio, 56, of 104-14 130th St., Richmond Hill, Queens.

August M. Mascia, 50, of 155-03 Jewel Ave., Flushing, Queens.

Leonard Monteleone, 52, 1673 Woodbine St., Ridgewood.

Joseph M. Barbara, 59, of 445 54th St., Brooklyn.

Also Sanitation men John L. Alessio, 40, of Tenafly Court, Tenafly, N.J.

Anthony Calabrese, 58, of 331 E. 146th St.

Nicholas J. Caruso, 54, of 164-39 76th Ave., Flushing, Queens.

Nunzio Chierico, 46, of 203 St. Nicholas Ave., Brooklyn.

Philip D'Agostino, 51, of 137 Greaves Ave., Staten Island.

Marcus F. King, 41, of 499 Vermont St., Brooklyn.

Peter I. Lombardo, 43, of 2724 Coyle St., Brooklyn.

Michael A. Mango, 45, of 339 Pennyfield Ave., Bronx.

James Minter, 45, of 56-36 Waldron St., Corona, Queens.

Joseph Miranda, 42, of 209-40 41st Ave., Bayside, Queens.

Anselmo Quinones, 45, of 1602 Undercliff Ave., The Bronx.

Exhibit C, Annexed to Foregoing Affidavit

December 7, 1966

Hon. Arnold G. Fraiman
Commissioner of Investigation
111 John Street
New York, New York

Dear Mr. Fraiman:

I represent the Uniformed Sanitationmen's Association, certain of its members and several other employees of the Department of Sanitation who were suspended on December 2 and December 6, 1966 on the ground, in most instances, that they had invoked their constitutional privilege against self-incrimination in hearings conducted by you.

In order adequately to protect their rights, it is necessary that the transcripts of those hearings be made available to me. I am advised by Mr. Morris Weissberg, who represented many of these employees at the hearings before you, that he requested the transcripts of you, and that you declined to deliver them to him.

I shall appreciate it if you would reconsider this matter and deliver these transcripts of the hearings to me in accordance with the enclosed authorization. I am sure that you will appreciate the materiality of these transcripts since your report of the hearings to the Commissioner of Sanitation was the basis for the suspensions.

I shall appreciate your telephoning me upon the receipt of this letter.

Sincerely yours,

LEONARD B. BOUDIN

LBB:ts
Enc.
BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Exhibit D, Annexed to Foregoing Affidavit

December 7, 1966

Hon. Samuel J. Kearing, Jr.
Commissioner of Sanitation
Department of Sanitation
125 Worth Street
New York, New York 10013

Dear Mr. Kearing:

As you may know, this office has been retained by the Uniformed Sanitationmen's Association to represent the union's members who were suspended from their employment by you pursuant to letters dated December 2 and December 6, 1966 by reason of the invocation of their constitutional privilege against self-incrimination. This office accordingly represents both the union members and other employees whose names appear in the enclosed letter of authorization.

I am advised that the transcripts of the hearings conducted before the Commissioner of Investigation are still in his possession, and that he has thus far declined to make them available to Morris Weissberg, Esq., who represented many of these employees at the hearings. I have written to Mr. Fraiman requesting that these transcripts be given to me.

Independently of that request, I now request that you deliver to me those transcripts which are in your possession. If they are not presently in your possession, I presume that the transcripts will be made available to you by Mr. Fraiman upon demand. In such case, may I request that you do secure those transcripts immediately and make them available to me.

I would appreciate your telephoning me upon receipt of this letter.

Sincerely yours,

LEONARD B. BOUDIN

LBB:ts
BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Exhibit E, Annexed to Foregoing Affidavit

CITY OF NEW YORK
DEPARTMENT OF INVESTIGATION
111 John Street
New York, N. Y. 10038
COrtlandt 7-6000

In Reply Please
Refer to
5425/66

December 8, 1966

Leonard B. Boudin, Esq.
Messrs. Rabinowitz & Boudin
30 East 42nd Street
New York, N. Y. 10017

Dear Mr. Boudin:

Thank you for your letter of December 7 in which you request that I furnish you with copies of the transcripts of the 16 suspended employees of the Department of Sanitation whom you represent. The transcripts which you request were of private hearings conducted by this Department pursuant to Chapter 34 of the New York City Charter.

It is the policy of this office not to make such transcripts available, either to witnesses or their attorneys. However, in view of the fact that 13 of your clients will be charged with refusing to answer questions put to them by this Department, I shall be pleased to make copies of their transcripts available to you when such charges are served. It is anticipated that this will be some time next week. With respect to the remaining three men, I cannot state whether copies of their transcripts will be made available until the specific nature of the charges against them are finally determined.

Very truly yours,

ARNOLD GUY. FRAIMAN
Commissioner

Affidavit of Leonard Monteleone, Read in Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LEONARD MONTELEONE, being duly sworn, deposes and says:

1. I am one of the plaintiffs in this action. I am an assistant foreman in the Department of Sanitation and have been employed by the Department for 24 years. I am in the classified civil service of the State of New York and am a veteran of the second World War.

I am married and have four children.

2. On or about November 24, 1966 I was instructed by the Department of Investigation to appear at its offices, I did so, and was interrogated by Commissioner Fraiman. The Commissioner played tape recordings of telephone conversations in which he said I had participated.

3. On December 2, 1966 I received a telephone call from Superintendent Beers of the Department of Sanitation advising me that I was suspended from duty without pay.

4. On December 6, 1966, Commissioner of Sanitation, Samuel J. Kearing, Jr. wrote me confirming the suspension because of "information received from the Commissioner of Investigation concerning irregularities arising out of your employment in the Department of Sanitation".

LEONARD MONTELEONE

(Sworn to December 8, 1966.)

Affidavit of August Mascia, Read in Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

AUGUST MASCIA, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I am an Assistant Foreman in the Department of Sanitation and have been employed by the Department for 22 years. I am a Civil Service employee on the Classified list and am an honorably discharged veteran.

On November 28, 1966, a representative of the New York City, Department of Investigation appeared at my house and asked me to accompany him to a meeting with the Commissioner of Investigation, Arnold G. Fraiman. When I met with Mr. Fraiman that day he asked me several questions, all of which I answered. At that point I said I wouldn't answer any further questions before seeing an attorney. Later that day I contacted my attorney, Leo Cirabisi, Esq., who in turn phoned Mr. Fraiman and scheduled an appointment for the following morning.

On November 29, 1966, I accompanied my attorney to the scheduled meeting with Mr. Fraiman. My attorney began by asking Mr. Fraiman what the charges were against me. Mr. Fraiman explained that I was taking money from private contractors instead of tickets which they had purchased from the City. Mr. Fraiman said he had proof of this in the form of a recorded telephone con-

versation. Then Mr. Fraiman proceeded to question me as he had the preceding day as to whther I knew a Frank Perna. I answered that I did not know him, at which point Mr. Fraiman played a tape recording of a telephone conversation purportedly between myself and Mr. Perna.

I then consulted my attorney and upon his advice, decided not to answer any further questions and to invoke my constitutional privilege against self-incrimination. My attorney informed Mr. Fraiman of this decision.

The Commissioner then called in a stenographer and put me under oath. I stated my name and address. After Mr. Fraiman asked me four other questions, each of which I answered by asserting my constitutional privilege, my attorney stated for the record that I was being "hounded and badgered".

Thereafter, I received a letter dated December 2, 1966, from the Commissioner of Sanitation, Samuel J. Kearing, Jr., which advised me that I was suspended from my employment without pay, effective immediately, because I had invoked my constitutional privilege against self-incrimination. The letter was the same in substance as that sent to Joseph Miranda, one of the plaintiffs in this action, and filed in support of the pending motion.

AUGUSTA MASCIA.

(Sworn to December 9, 1966.)

Affidavit of Joseph Miranda, Read in Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOSEPH MIRANDA, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I have been employed by the Department of Sanitation for 13½ years and have been employed, more particularly, at the 91st Street location since July 1966. I am an honorably discharged veteran and am a Civil Service employee on the Classified list.

On November 22, 1966, I was called to the office of Arnold G. Fraiman, Commissioner of Investigation, without legal counsel. When I appeared on that date, Mr. Fraiman played a series of tape recordings which he suggested was a tape recording of a telephone conversation between myself and other persons.

Thereafter, on November 23, 1966, I appeared at the office of the Commissioner of Investigation with Morris Weissberg, Esq., my legal counsel. Mr. Fraiman called in a stenographer and placed me under oath. He then asked me a number of questions which I declined to answer on the ground of my constitutional privilege against self-incrimination.

Thereafter, on December 2, 1966, I received a letter bearing that date from Samuel J. Kearing, Jr., Commissioner of Sanitation, which is annexed hereto as Exhibit A. That

letter stated that because I invoked my constitutional privilege against self-incrimination at the hearing before the Commissioner of Investigation, I was suspended without pay, from my position, effective immediately.

JOSEPH MIRANDA

(Sworn to December 8, 1966.)

Exhibit A. Annexed to Foregoing Affidavit

THE CITY OF NEW YORK
DEPARTMENT OF SANITATION
125 Worth Street
New York, N. Y. 10013

December 2, 1966

Mr. Joseph Miranda
209-40 41st Avenue
Bayside, N. Y.

Dear Mr. Miranda:

The Commissioner of Investigation has informed me that in a Private Hearing, conducted pursuant to Chapter 34 of the New York City Charter, at the Department of Investigation on November 23, 1966, you invoked your Constitutional privilege against self-incrimination and refused to answer any questions relating to your duties and employment with the Department of Sanitation on the ground that the answers thereto would tend to incriminate you.

This is to inform you that for the foregoing reasons and pursuant to Section 1123 of the Charter, you are hereby suspended, without pay, from your position of Sanitation Man in the Department of Sanitation, effective immediately.

Very truly yours,

SAMUEL J. KEARING, JR.,
Commissioner of Sanitation

SJK-tp

Affidavit of Nunzio Chierico, Read in Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

NUNZIO CHIERICO, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I am a Sanitation Man and have been employed by the Department of Sanitation for 13 years. I am a member of the Classified Civil Service, and am stationed currently at the 91st Street location.

I am a member of the plaintiff Uniformed Sanitation Men Association, Inc., also known as Uniformed Sanitation Men Association, Local 831, IBT (Ind.).

On November 23, 1966, I was called down to the office of Arnold G. Fraiman, Commissioner of Investigation, and was asked certain questions under oath. Mr. Fraiman told me that he had records of telephone conversations and movies, but neither played the tapes nor showed me the movies.

After asking me one or two questions, I was discharged and thereafter on the same day returned to Mr. Fraiman's office, at his instructions, with my attorney, Morris Weissberg, Esq.

I was put under oath, and then asked various questions by Mr. Fraiman. I declined to answer a number of those questions on the ground of my constitutional privilege against self-incrimination.

Affidavit of Bernard F. Bellettiere

Thereafter, I received a letter dated December 2, 1966, from the Commissioner of Sanitation, Samuel J. Kearing, Jr., that I had been suspended without pay, effective immediately, by reason of my assertion of the constitutional privilege against self-incrimination. The letter was in substantially the same form as that addressed to Joseph Miranda, which is attached to his affidavit of this date in support of this motion.

NUNZIO CHIERICO

(Sworn to December 8, 1966.)

Affidavit of Bernard F. Bellettiere, Read in Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NE YORK }
COUNTY OF NEW YORK } ss.:

BERNARD F. BELLETTIERE, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action. I have been employed by the Department of Sanitation for the last 18 years and have the position of Foreman. I am stationed at the 91st Street location.

I am in the Classified Civil Service, and an honorably discharged veteran of World War II, receiving 10% permanent disability benefits.

Affidavit of Bernard F. Bellettiere

On November 22, 1966, I appeared at the office of the Department of Investigation, without legal counsel, and was interrogated by Commissioner Arnold G. Fraiman. Mr. Fraiman in the course of the interrogation played a series of tape recordings which he characterized as telephone conversations between myself and other fellow employees.

Mr. Fraiman called in a stenographer and put certain questions to me which I declined to answer on the basis of my constitutional privilege against self-incrimination.

Thereafter, by letter dated December 2, 1966, in form substantially similar to that addressed to Joseph Miranda, and attached to his affidavit submitted herewith, I was advised by Samuel J. Kearing, Jr., Commissioner of Sanitation, that I was suspended without pay, effective immediately, because "you invoked your constitutional privilege against self-incrimination and refused to answer any questions relating to your duties and employment with the Department of Sanitation on the ground that the answers thereto would tend to incriminate you".

BERNARD F. BELLETTIERE

(Sworn to December 8, 1966.)

Affidavit of Nicholas J. Caruso, Read in Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

NICHOLAS J. CARUSO, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I have been an employee of the Department of Sanitation for the last 17½ years and have been stationed at the 91st Street location for the last 10-11 years. I am a Civil Service employee on the Classified list.

On November 23, 1966, I appeared at the office of the Commissioner of Investigation, Arnold G. Fraiman, without legal counsel. When I appeared, Mr. Fraiman asked me a series of questions. I was then told to reappear with legal counsel and later in the same day I appeared with Morris Weissberg, Esq., my legal counsel.

I was placed under oath and asked a series of questions, a number of which I declined to answer on the ground of my constitutional privilege against self-incrimination.

Thereafter, I received a letter dated December 2, 1966, from the Commissioner of Sanitation, Samuel J. Kearing, Jr., that I had been suspended without pay, effective immediately by reason of my assertion of my constitutional privilege against self-incrimination. The letter was the same in substance as that sent to Joseph Miranda, one of the plaintiffs in this action, and filed in support of the pending motion.

NICHOLAS J. CARUSO.

(Sworn to December 8, 1966.)

Affidavit of Anselmo Quinones, Read in Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

ANSELMO QUINONES, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I am a Sanitation Man and have been employed by the Department of Sanitation for 14 years. I am a Civil Service employee on the Classified list and an honorably discharged veteran.

On November 28, 1966, I was taken by a representative of the Department of Investigation to the office of the Commissioner of Investigation, Arnold G. Fraiman. Before I was placed under oath, Mr. Fraiman played the tape of a telephone conversation purporting to be held between myself and a private cartman. Mr. Fraiman then asked me several questions. I told Mr. Fraiman that I was not involved in any wrong-doing which may be the subject of this investigation, and that I was too nervous to answer any further questions by myself and that I would have to get an attorney.

When I returned later that same day I was accompanied by my attorney, Morris Weissberg, Esq. and he asked Mr. Fraiman for a week's adjournment. Instead we got an adjournment until the following day.

On November 29, 1966, Mr. Weissberg and I returned to Mr. Fraiman's office at which time a stenographer was

present and I was placed under oath. I was cautioned by Mr. Fraiman that if I refused to answer any questions with respect to my official conduct on the grounds of my privilege against self-incrimination, my employment would be terminated. Mr. Fraiman then went on to ask me three questions and to each one of these I refused to answer by asserting my constitutional privilege.

At some point during this hearing, Mr. Fraiman indicated to Mr. Weissberg that he had overhead telephone conversations to which I was a party.

Thereafter, on December 2, 1966, I received a letter from the Commissioner of Sanitation, Samuel J. Kearing, Jr., that I had been suspended without pay, effective immediately, by reason of my assertion of my constitutional privilege against self-incrimination. The letter is the same in substance as that sent to Joseph Miranda, one of the plaintiffs in this action, and filed in support of the pending motion.

ANSELMO QUINONES.

(Sworn to December 9, 1966.)

Affidavit of Anthony Calabrese, Read in Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

ANTHONY CALABRESE, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I am a Sanitation Man and have been employed by the Department of Sanitation for 36 years. I am a Civil Service employee on the Classified list.

On November 28, 1966, a representative of the Department of Investigation came to my home and asked me to accompany him to the Department's office. On arrival, I met Arnold G. Fraiman, Commissioner of Investigation. Mr. Fraiman played a tape recording of a telephone conversation which he said was between myself and other persons. I was then placed under oath and asked whether I wanted an attorney. I answered no. Mr. Fraiman then asked me a number of questions, all of which I answered.

I did not invoke my constitutional privilege against self-incrimination to any of the questions asked me.

Thereafter, on December 2, 1966, I received a letter bearing that date from Samuel J. Kearing, Jr., Commissioner of Sanitation, a copy of which is attached hereto as Exhibit A. That letter stated that upon information received by the Commissioner of Investigation concerning irregularities arising out of my employment in the Department of Sanitation, I was suspended without pay from my position, effective immediately.

ANTHONY CALABRESE.

(Sworn to December 9, 1966.)

Exhibit A, Annexed to Foregoing Affidavit

THE CITY OF NEW YORK
DEPARTMENT OF SANITATION
125 Worth Street
New York, N. Y. 10013

December 6, 1966

Mr. Anthony Calabrese
331 East 146th Street
Bronx, N. Y. 10451

Dear Mr. Calabrese:

On December 2, 1966 Senior Superintendent David A. Beer, in charge of the Division of Marine Operations of the Bureau of Waste Disposal, following instructions from his superior and at my direction, advised you by telephone, that you were suspended without pay from your position of Sanitation Man, effective immediately.

This communication hereby confirms your suspension of Friday, December 2, 1966 which is based upon information received from the Commissioner of Investigation concerning irregularities arising out of your employment in the Department of Sanitation.

Very truly yours,

SAMUEL J. KEARING, JR.
Commissioner of Sanitation

SJK-tp

Affidavit of James D. Minter, Read in Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES D. MINTER, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I am a Sanitation Man employed by the Department of Sanitation for 11 years. I am a Civil Service employee on the Classified list and am an honorably discharged veteran.

On November 23, 1966, I appeared at the office of the Commissioner of Investigation, Arnold G. Fraiman, without legal counsel. At this time Mr. Fraiman played a tape for me and then put me under oath and asked various questions. After telling him my name and address, I refused to answer any further questions without the presence of an attorney. I was then told by Mr. Fraiman to reappear with legal counsel. Later in the same day I appeared with Morris Weissberg, Esq., my legal counsel.

I was again placed under oath and upon advice of counsel, asserted my Fifth Amendment privilege against self-incrimination to each question asked me.

Thereafter, I received a letter dated December 2, 1966, from the Commissioner of Sanitation, Samuel J. Kearing, Jr., suspending me without pay, effective immediately, from my position in the Department of Sanitation, on the ground that I had invoked my constitutional privilege against self-incrimination. The letter was the same in

substance as that sent to Joseph Miranda, one of the plaintiffs in this action, and filed in support of the pending motion.

JAMES D. MINTER.

(Sworn to December 9, 1966.)

Affidavit of Marcus F. King, Read in Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MARCUS F. KING, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I have been employed by the Department of Sanitation for 16 years as a Sanitation Man. I am a Civil Service employee on the Classified list and an honorably discharged veteran.

On November 23, 1966, a representative of the Department of Investigation appeared at my house, and instructed me to report immediately to the Commissioner of Investigation.

When I appeared before the Commissioner, Arnold G. Fraiman, he began our conversation immediately by asking me about my dog. This was clearly a warning to me that my telephone conversations had been taped, since I had had telephone conversations referring to my dog. Mr. Fraiman did not tell me whether there were any charges against

me or what the subject of the investigation was. However, he did ask me to make a statement but I advised him that I would have to consult counsel. He instructed me to come down that afternoon with an attorney.

That afternoon of the same day, I returned to the Commissioner's office with Morris Weissberg, Esq. After I was put under oath, section 1123 of the New York City Charter was read to me and I was warned of the loss of my job if I refused to answer questions. Mr. Fraiman put a number of questions to me and after answering as to my name, address and how long I worked for the City, I declined to answer all further questions on the ground of my constitutional privilege against self-incrimination.

Thereafter, on December 2, 1966, I received a letter from the Commissioner of Sanitation, Samuel J. Kearing, Jr., advising me that I had been suspended without pay, effective immediately, from my position as Sanitation Man by reason of my invocation of my constitutional privilege against self-incrimination. That letter is in substance the same as that which is attached to the affidavit of Joseph Miranda, one of the plaintiffs in this action, and filed in support of the pending motion.

MARCUS F. KING.

(Sworn to December 9, 1966.)

Affidavit of Joseph M. Barbara, Read in Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JOSEPH M. BARBARA, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I am an Assistant Foreman in the Department of Sanitation. I have been employed by the Department of Sanitation for 36 years, and am stationed at the 91st Street location. I am a Classified Civil Service employee.

On November 22, 1966, I appeared at the office of Arnold G. Fraiman, Commissioner of Investigation of the City of New York, without legal counsel. When I appeared Mr. Fraiman played a series of tape recordings which he indicated was a tape recording of a telephone conversation between myself and other persons.

Mr. Fraiman thereafter called in a stenographer and placed me under oath. He then asked me a number of questions which I declined to answer, stating that "I want to remain still".

Thereafter, on December 2, 1966, I received a letter bearing that date from Samuel J. Kearing, Jr., Commissioner of Sanitation. That letter stated that because I invoked my constitutional privilege against self-incrimination at the hearing before the Commissioner of Investigation, I was suspended, without pay, from my position, effective immediately. The letter was the same in substance

as the letter annexed to the affidavit of Joseph Miranda, one of the plaintiffs in this action, sworn to this date and filed in support of the pending motion.

JOSEPH M. BARBARA

(Sworn to December 8, 1966.)

Affidavit of Peter I. Lombardo, Read in Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PETER I. LOMBARDO, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action. I am a Sanitationman and have been employed by the Department of Sanitation for eighteen years. I am a civil service employee on the classified list, and a veteran of the Second World War.

On November 23, 1966, a representative of the Department of Investigation called upon me at my home and took me to the office of the Commissioner of Investigation. There I saw Mr. Fraiman who told me that a tape recording had been made of my telephone conversation with other people with respect to the subject matter of his investigation. He did not play any tape, but recited to me at least one statement that I was alleged to have made.

Affidavit of Philip D'Agostino

I made no answer to questions put to me by Mr. Fraiman. He then advised me to see an attorney. I then contacted Morris Weissberg, Esq., who returned with me and was present at Mr. Fraiman's office. I was then sworn and asked various questions which I declined to answer on the ground of my privilege against self-incrimination.

By letter of December 2, 1966, I was advised by the Commissioner of Sanitation that I had been suspended for invoking my privilege against self-incrimination. That letter is in substantially the same form as that attached to the affidavit of this date of Mr. Joseph Miranda.

PETER I. LOMBARDO

(Sworn to December 8, 1966.)

Affidavit of Philip D'Agostino, Read in Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PHILIP D'AGOSTINO, being duly sworn, deposes and says:

I am one of the plaintiffs in this action.

I am a Sanitationman, and have been employed by the Department of Sanitation for eighteen years. I am a classified civil service employee, with tenure, under the Civil Service Law of the State of New York, and eligible

for retirement in three years. I am a member of the plaintiff union.

On November 23, 1966, I was instructed by an Assistant Foreman to go down to the office of the Commissioner of Investigation. I went to that office with Morris Weissberg, Esq., my attorney, where we met with Arnold G. Fraiman, the Commissioner of Investigation. Mr. Fraiman read me a statement to the effect that if I refused to answer questions, I would be suspended or dismissed under the New York City Charter.

I was placed under oath and asked various questions, many of which I declined to answer on the ground of my privilege against self-incrimination. I was then told to go back to work, and that I would be notified of my suspension. A stenographic record was made of the hearing.

Thereafter, I received a letter dated December 2, 1966 from the Commissioner of Sanitation. That letter, which in substance is the same as that addressed to Mr. Joseph Miranda and attached to his affidavit herein, advised me that I was suspended without pay, effective immediately, pursuant to Section 1123 of the New York City Charter because I had invoked my constitutional privilege against self-incrimination.

PHILIP D'AGOSTINO

(Sworn to December 8, 1966.)

Affidavit of Anthony D'Ambrosio, Read in Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

ANTHONY D'AMBROSIO, being duly sworn, deposes and says:

I am one of the plaintiffs in this action.

I am an assistant foreman in the Department of Sanitation where I have been employed for twenty-three years. I am in the classified civil service of the State of New York. I am married and have three children.

On November 23, 1966, I was instructed to appear at the office of the Department of Investigation. I did so and was interrogated by Commissioner Fraiman. He played a tape recording of what he said was a conversation between me and another plaintiff, Mr. Bernard F. Bellettiere. I stated that I wanted an attorney, and was told to return on Friday, November 25, 1966 with a lawyer.

I did consult with counsel and returned on Friday, November 25, 1966 to Mr. Fraiman's office without, however, my counsel being present. Mr. Fraiman adjourned the matter and told me to return on Monday, November 28, 1966 with counsel, which I did. My attorney was John Landers, Esq. of Queens. Mr. Fraiman took Mr. Landers into another room where I am advised he played a tape recording for a half hour or more. I then consulted with Mr. Landers.

On the same day a stenographic record was made, and I was put under oath and interrogated by Mr. Fraiman.

On December 2, 1966, Superintendent David H. Beer of the Department of Sanitation advised me by telephone that I was suspended without pay from my position as assistant foreman, effective immediately.

On December 6, 1966, I received a letter from Commissioner Samuel J. Kearing, Jr., the Commissioner of Sanitation, which confirmed my suspension and stated that it "is based upon information received from the Commissioner of Investigation concerning irregularities arising out of your employment in the Department of Sanitation." A copy of that letter is annexed hereto.

PHILIP D'AMBROSIO

(Sworn to December 8, 1966.)

Affidavit of John L. Alessio, Read in Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN L. ALESSIO, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I am a Sanitation Man employed by the Department of Sanitation for the last 15 years. I have been stationed at the 91st Street location for approximately the last five years.

Affidavit of John L. Alessio

I am an honorably discharged veteran and a Civil Service employee on the Classified list.

On Wednesday, November 23, 1966, at approximately 11:00 a.m. I appeared at the office of the Commissioner of Investigation, Arnold G. Fraiman, without legal counsel. Mr. Fraiman indicated he had tape recordings of telephone conversations, one of which he played to me. I recognized neither of the voices as my own. Mr. Fraiman then asked me a series of questions, none of which I comprehended. Mr. Fraiman then suggested that I return with a lawyer.

At approximately 3:00 p.m. on November 23, 1966, I appeared before Mr. Fraiman with my legal counsel, Morris Weissberg, Esq. I was placed under oath and asked a question which I did not understand. I responded that in January 1965, I suffered a serious injury to my head during the course of my employment, that I had been hospitalized as an out-patient for a period of six months immediately thereafter, and that since then I have not been able to understand the nature of many inquiries and frequently give answers which are not responsive to a question.

Immediately thereafter, I consulted with my legal counsel, who, I understand, then read a statement to Mr. Fraiman which described the nature of my injury.

I believe the hearing was adjourned without date, pending an examination by a city psychiatrist, which examination took place on November 25, 1966.

The psychiatrist I saw at the City Clinic apparently could make no diagnosis and referred me to the neurologist who I have been seeing since my injury, Dr. John Bianchi.

I then received a letter dated December 6, 1966, from Samuel J. Kearing, Jr., Commissioner of Sanitation, a copy of which is attached hereto as Exhibit A, which confirmed that I had been suspended without pay from my position as Sanitation Man on December 2, 1966. The letter indicated further that "This communication hereby confirms your

suspension of Friday, December 2, 1966 which is based upon information received from the Commissioner of Investigation concerning irregularities arising out of your employment in the Department of Sanitation".

JOHN L. ALESSIO

(Sworn to December 12, 1966.)

Affidavit of Michael A. Mango, Read in Support of Plaintiffs' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MICHAEL A. MANGO, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I have been an employee of the Department of Sanitation for 16½ years as a Sanitation Man, and have been stationed at the 91st Street location for the past three years. I am an honorably discharged veteran with a permanent disability of 20%, and I am a Civil Service employee on the Classified list.

On November 22, 1966, I appeared at the office of Arnold G. Fraiman, Commissioner of Investigation of the City of New York, without legal counsel. I was interviewed by Mr. Robert Ruskin, who played a series of tape recordings which he indicated was a tape recording of telephone conversations between myself and other persons. Mr. Ruskin then

asked a series of questions which I refused to answer on the ground that I wanted to consult an attorney and to be advised of my rights.

Mr. Ruskin, despite my request, put me under oath and began to ask a series of questions. I indicated that I would not answer any questions without an attorney.

On November 23, 1966, I appeared at the office of Arnold G. Fraiman with my legal counsel, Morris Weissberg, Esq.

I was placed under oath and asked a series of questions which I declined to answer, stating that I invoked my constitutional privilege against self-incrimination.

Thereafter, on December 2, 1966, I received a letter bearing that date from Samuel J. Kearing, Jr., Commissioner of Sanitation. That letter stated that because I invoked my constitutional privilege against self-incrimination at the hearing before the Commissioner of Investigation, I was suspended from my position without pay, effective immediately. The letter was the same in substance as that sent to Joseph Miranda, one of the plaintiffs in this action and filed in support of the pending motion.

MICHAEL A. MANGO

(Sworn to December 9, 1966.)

Order to Show Cause on Defendants' Motion

(R. pp. 11-33)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Upon the summons and complaint herein, and upon the annexed affidavits of Arnold Guy Fraiman and Samuel J. Kearing, both sworn to the 16th day of December, 1966,

LET the plaintiffs' show cause before this Court at a civil motion part thereof, to be held in Room 506 of the United States Courthouse, Foley Square, New York, N.Y., on the 20th day of December, 1966 at 10:00 a.m. why an order should not be granted:

(1) Dismissing the complaint herein pursuant to Rule 12 (b)(6) of the Federal Rules of Civil procedure [sic] on the ground that said complaint fails to state a claim upon which relief can be granted; and

(2) Granting to the defendants such other and further relief as to the Court be just and proper [sic].

Sufficient reason appearing therefor, service of this order and the papers upon which it is based upon Rabinowitz & Boudin, Esqs., Morris Weissberg, Esq. and John J. De Lury, Jr., Esq. being the attorneys for the plaintiffs herein by leaving a copy thereof with the persons in charge of each of their offices, on or before the 16th day of December, 1966, shall be deemed good and sufficient service.

Dated: December 16th, 1966.

S/ EDMUND L. PALMIERI,
U.S.D.J.

Affidavit of Samuel J. Kearing, Read in Opposition to Plaintiffs' Motion and in Support of Defendants' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

SAMUEL J. KEARING, being duly sworn, deposes and says:

I am the Commissioner of the Department of Sanitation of the City of New York. I make this affidavit in opposition to plaintiffs' motion for a preliminary injunction and other relief, and in support of defendants' motion to dismiss the complaint.

Each of the plaintiffs is an employee of the Sanitation Department and is a member of the classified civil service subject to the disciplinary procedure set forth in Section 75 of the Civil Service Law.

On or about December 2, 1966, pursuant to the provisions of Section 75, I notified each of the plaintiffs that he was suspended pending determination of charges against him.

Under Section 75, an employee may be suspended without pay for a period not exceeding thirty days. On December 16, 1966 the formal charges against 12 of the plaintiffs were issued. A copy of a typical set of such charges is annexed hereto and marked Exhibit A. I expect to issue charges against the other plaintiffs at an early date. Each person charged has not less than eight days following

receipt of charges to answer. At the present time no plaintiff has answered and no hearings have been held.

Hearings will be held promptly in accordance with law and the penalties, if any, imposed as a result must await the conclusion of such hearings. At the hearings each of the plaintiffs will have an opportunity with the advice of counsel to respond to the charges against him.

I am advised by counsel that in the event a decision is rendered as a result of the departmental hearings which is adverse to any of the plaintiffs herein such a decision may be reviewed in the Supreme Court of New York State under the provisions of Article 78 of the Civil Practice Law and Rules.

At the present time not one of the plaintiffs has been dismissed.

Defendants bring on this motion by order to show cause rather than by notice of motion since plaintiffs' motion for an injunction and other relief (also brought on by order to show cause) is now returnable on December 20, 1966 and thus this motion, which should be heard at the same time, could not be brought on by notice of motion.

No previous application for the relief sought herein has been made to any court or judge thereof.

WHEREFORE I respectfully request this Court to deny plaintiffs' motion in all respects and to grant defendants' motion to dismiss the complaint.

SAMUEL J. KEARING.

(Sworn to December 16, 1966.)

Exhibit A, Annexed to Foregoing Affidavit

CITY OF NEW YORK

DEPARTMENT OF SANITATION

In the Matter of the Charges

against

PHILIP D'AGOSTINO

To:

PHILIP D'AGOSTINO
137 Greaves Avenue
Great Kills, S.I., N. Y.

PLEASE TAKE NOTICE that, pursuant to Section 75 of the New York Civil Service Law, you are hereby charged with misconduct in your official capacity as Sanitation Man in the New York City Department of Sanitation, in that:

In a private hearing conducted by the New York City Department of Investigation on November 23, 1966 as authorized by Chapter 34 of the New York City Charter, you refused to answer any questions regarding your official conduct, namely, questions regarding the performance of your duties as an employee of the New York City Department of Sanitation, on the ground that your answers would tend to incriminate you, after having been fully advised that such refusal to testify constitutes sufficient basis for the termination of your employment under Section 1123 of the New York City Charter.

The aforesaid constitutes unlawful conduct and reflects discredit upon the Department of Sanitation of the City of New York in violation of Rules 3(a) and 3(b) of the

Exhibit A

Code of Discipline of the Department of Sanitation of the City of New York.

You are hereby notified to appear before the duly designated Hearing Officer for a hearing on these charges on December 27, 1966 at 10:00 A.M. in Room 710, 125 Worth Street, New York City at which time you will be given an opportunity to answer the above charges.

Being a competitive employee, you may submit an answer to such charges in writing within eight days of receipt of these charges and you are entitled to be represented by counsel of your choice at the said hearing. You may also summon any witnesses to testify on your behalf.

You are further notified that upon the establishment of the truth of any or all of the above charges, you may be removed from your position or may be subject to whatever disciplinary action may be warranted.

Dated: New York City
December 16, 1966

SAMUEL J. KEARING, JR.
Commissioner, Department of Sanitation

Affidavit of Arnold Guy Fraiman, Read in Opposition to Plaintiffs' Motion and in Support of Defendants' Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ARNOLD GUY FRAIMAN, being duly sworn, deposes and says:

I am and at all times since January 1, 1966 have been the Commissioner of Investigation of the City of New York. I make this affidavit in opposition to plaintiffs' motion for an injunction and other relief and in support of defendants' motion to dismiss the complaint.

Section 803(2) of the New York City Charter authorizes and empowers the Commissioner of Investigation to

> "... make any study or investigation which in his opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency."

Pursuant to this authority, and as a result of information furnished by a reliable informant, I instituted an investigation of a reported practice under which employees of the Department of Sanitation were:

1. accepting less than the proper fees due to the City of New York from private cart men for the use of the facilities of the Department of Sanitation at the Marine Transfer Station, 91st Street and East River, Manhattan,

2. dividing the amounts received between themselves instead of paying them to the City.

My investigation showed that this practice indeed existed and that the City had been defrauded of hundreds of thousands of dollars in this way since at least 1959.

Some of the evidence in this investigation was obtained by a wiretap on a New York City telephone (AT-9-7935) leased for the transaction of official business by the Sanitation Department at its Marine Transfer Station at 91st Street and the East River, Manhattan.

This was the only wiretap used during this investigation. The wiretap was authorized by an order duly made by a Justice of the New York State Supreme Court, County of New York, pursuant to Section 813-a of the New York Code of Criminal Procedure.

If the injunctive relief sought herein is granted, it will prevent me and my Department from carrying out duties mandated by the New York City Charter and would compel the reinstatement of 16 employees of the Sanitation Department who appear to have betrayed their public trust. It is obvious that the City of New York and its citizens would be irreparably harmed by the granting of the relief sought. Plaintiffs, on the other hand, would not be irreparably harmed if the relief is denied since they will be afforded an administrative hearing and full judicial review with the opportunity for review by the United States Supreme Court if it can be shown their rights were violated. If plaintiffs or any of them are successful in the administrative or judicial proceedings which will proceed promptly if the premature relief sought herein is denied, they will be entitled under State law to reinstatement with back pay and the other benefits to which they would have been entitled had they remained on the City's payroll.

ARNOLD GUY FRAIMAN

(Sworn to December 16, 1966.)

Affidavit of Leonard B. Boudin, Read in Opposition Defendants' Motion

(R. pp. 187-190)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LEONARD B. BOUDIN, being duly sworn, deposes and says:

I am the attorney for the plaintiffs in the within action.

Subsequent to the inception of the action, the Commissioner of Investigation transmitted, at my request, the transcripts of the hearings conducted before him involving the twelve plaintiffs who were suspended for asserting their constitutional privilege against self-incrimination. I have examined each of these transcripts and have noted that at the beginning of each of the hearings the Commissioner of Investigation made substantially the following statement:

> "Q. Mr. [name of witness], this is a private hearing being conducted by the Department of Investigation of the City of New York, pursuant to Chapter 34, of the New York City Chrater. The investigation in which you are about to testify relates particularly to the affairs, functions, accounts, methods, personnel and efficiency of the Department of Sanitation of the City of New York. I wish to advise you that you have all the rights and privileges guaranteed by the laws of the State of New York and the Constitutions of this State and of the United States,

including the right to remain silent and the right not to be compelled to be a witness against yourself. I wish further to advise you that anything you say can be used against you in a court of law. You have the right to have an attorney present at this hearing, if you wish, and I understand that you are represented by counsel in the person of [name of attorney], is that correct? A. Yes.

* * *

Q. You are further advised that if you do refuse to testify or to answer any question regarding the affairs of the City or regarding your official conduct or the conduct of any other officer or employee of the City on the ground that your answer would tend to incriminate you, your term or tenure of office or employment shall terminate and you shall not be eligible to election or appointment to any office or employment under the City or any agency, in accordance with the provisions of Section 1123 of the New York City Charter."

The variations in the text relate only to the name of the witness and to his right to a lawyer or to the fact that he had a lawyer.

I have agreed with the attorneys for the Commissioner of Sanitation that at the hearings now scheduled for December 27, 1966 we will stipulate with respect to the accuracy of the transcripts and the fact that the twelve witnesses asserted their constitutional privilege against self-incrimination under the Constitution of the United States.

The hearings with respect to the other individual plaintiffs, other than Mr. Alessio, are scheduled to be held on the 28th of December, 1966. I have not as yet received the transcripts.

LEONARD B. BOUDIN.

(Sworn to December 21, 1966.)

Opinion and Order of Cannella, *D. J.*

(R. pp. 180-186)

Plaintiffs' motions, for declaratory judgment pursuant to Rule 57 of the Federal Rules of Civil Procedure and for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, are denied without prejudice. Defendants' motion to dismiss the complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, is granted.

The facts upon which these motions are based are very simple. The individual plaintiffs are City employees working in the Department of Sanitation. While conducting an investigation of irregularities pursuant to Chapter 34 of the Charter of the City of New York, the Commisioner of Investigation obtained authorization in the Supreme Court, New York County, under the provisions of Section 813-a of the New York Code of Criminal Procedure to tap a particular telephone leased by the Department of Sanitation for the transaction of official business.

Subsequently, in November 1966, the Commissioner or his deputy, questioned the plaintiffs concerning their duties and employment. Twelve of them, after being advised that refusal to testify would result in termination of their employment, claimed their constitutional privilege against self incrimination and refused to testify. They were suspended on December 2, 1966 by the Commissioner of Sanitation pursuant to Section 1123 of the Charter of the City of New York.[1] Of the remaining four plaintiffs, one

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[1] Section 1123 of the Charter of the City of New York provides in pertinent part that "if any . . . employee of the city, after lawful notice or process . . . having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city . . . or official conduct of any officer or employee of the city . . . on the ground that his answer would tend to incriminate him . . . his term or tenure of office or employment shall terminate."

claimed to be incompetent and refused to testify and the other three testified. All four were suspended on December 2, 1966 based on information received from the Commissioner of Investigation concerning irregularities arising out of their employment.

At the present time the twleve employees suspended pursuant to Section 1123 of the Charter of the City of New York are awaiting a hearing to be held on December 27, 1966 at which they may be assisted by counsel and present any defense in their behalf. The remaining four are awaiting the same type of hearing, the date of which has not yet been set.

The plaintiffs have brought this motion to have this court declare Section 813-a of the New York Code of Criminal Procedure and Section 1123 of the Charter of the City of New York, unconstitutional and to enjoin the defendants from using the material acquired by the wiretapping and to order the plaintiffs reinstated in their positions.

The court finds that it has jurisdiction of these motions. 47 U.S.C. § 605; 42 U.S.C. § 1983; and 28 U.S.C. §§ 1331, 1343, 2201 and 2202.

However, the general rule in the federal courts is that although it has jurisdiction it will abstain from exercising it in a case presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law. *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941). Further, the federal courts exercise the doctrine of abstention on grounds of comity with the states when the exercise of jurisdiction by the federal court would disrupt a state administrative process *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).

The facts before this court present it with a disciplinary action between the City of New York and its employees.

At the present moment all of the sixteen employees are suspended and none can be dismissed until after the hearing.[2] *Conlon* v. *Murphy*, 24 A.D. 2d 737; 263 N.Y.S. 2d 360. Thus, this court denies plaintiffs' motions as premature and finds that the Administrative Code of the City of New York[3] and the New York Civil Practice Laws and Rules[4] provide adequate review of administrative decisions.

Further, this court exercises its right of abstention on the ground that plaintiffs' rights will be adequately protected under state remedies.[5] Action by this court at this time would be an undue interference with the state process. *Burford* v. *Sun Oil Co., supra; Fenster* v. *Leary*, 66 Civ. 1927 (S.D.N.Y. December 7, 1966, Kaufman, C.J., Mansfield and Tenney, D.JJ.).

It should be noted, however, that the court's conclusion that plaintiffs have not met the requirements of 28 U.S.C. § 2201 for a declaratory judgment at this juncture of the administrative proceeding, is in no manner a determination by this court that Section 813-a of the New York Code of Criminal Procedure and Section 1123 of the Charter of the City of New York are constitutional. This court is confident that the state courts of New York are sensitive to and will

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[2] The contention by the plaintiffs that they are automatically dismissed and that the hearings are only *pro forma* hearings is an issue which ought to be decided by a state and not a federal court. *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167 (1959).

[3] See: Administrative Code of the City of New York § 752-6.0(d).

[4] See: CPLR §§ 7801-06; §§ 6301-15; § 3017.

[5] *Daniman* v. *Board of Education*, 306 N.Y. 532, 119 N.E. 2d 373 (1954), rev'd on other grounds, *Slochower* v. *Board of Education*, 350 U.S. 551 (1956); *Roosevelt Raceway* v. *Co. of Nassau*, 18 N.Y. 2d 30 (1966).

give careful consideration to the very serious constitutional issues that the plaintiffs have raised herein.

So ordered.

Dated: New York, N. Y.,
December 27, 1966.

JOHN M. CANNELLA,
U. S. D. J.

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 381—September Term, 1966.

(Argued March 23, 1967 Decided September 20, 1967.)

Docket No. 31014

UNIFORMED SANITATION MEN ASSOCIATION, INC., LEONARD MONTELEONE, AUGUST MASCIA, JOSEPH MIRANDA, NUNZIO CHIERICO, BERNARD F. BELLETTIERE, NICHOLAS J. CARUSO, ANSELMO QUINONES, ANTHONY CALABRESE, JAMES D. MINTER, MARCUS F. KING, JOSEPH BARBARA, PETER I. LOMBARDO, PHILIP D'AGOSTINO, ANTHONY D'AMBROSIO, JOHN L. ALESSIO and MICHEAL A. MANGO,

Plaintiffs-Appellants,

—v.—

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, COMMISSIONER OF INVESTIGATION OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK,

Defendants-Appellees.

Before:

MOORE and HAYS, *Circuit Judges,* and
DOOLING, *District Judge.**

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* Of the Eastern District of New York, sitting by designation.

Opinion of the Court of Appeals

Appeal from an order of the United States District Court for the Southern District of New York, John M. Cannella, *Judge*, denying plaintiffs' motions for a preliminary injunction and discovery and granting defendants' motion to dismiss the complaint in an action to enjoin defendants from violating plaintiffs' constitutional rights.

Affirmed.

LEONARD B. BOUDIN (Victor Rabinowitz, of counsel, Rabinowitz & Boudin, Morris Weissberg, and John J. DeLury, New York, New York, on the brief), *for Appellants.*

JOHN J. LOFLIN (Frederick S. Nathan and Robert C. Dinerstein, of counsel, J. Lee Rankin, Corporation Counsel of the City of New York, on the brief), *for Appellees.*

HAYS, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Southern District of New York in an action to enjoin defendants from violating plaintiffs' constitutional rights, denying plaintiffs' motion for summary judgment and granting defendants' motion to dismiss the complaint. We affirm the dismissal of the complaint, although on grounds different from those on which the district court relied.

There is no dispute as to the material facts. Some time in 1966 the defendant Commissioner of Investigation of the City of New York was informed that employees in the Department of Sanitation were not charging private cartmen the proper fees for use of City facilities at the Marine Transfer Station, located at 91st Street and the East River in Manhattan, and that these employees were diverting to

themselves the proceeds of the fees they did charge, thus causing the City to lose hundreds of thousands of dollars of revenue. Exercising his powers under Section 803(2) of the New York City Charter,[1] the Commissioner undertook an investigation of these irregularities. He obtained a court order in the Supreme Court, New York County, under the provisions of Section 813-a of the Code of Criminal Procedure of the State of New York,[2] authorizing him

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[1] Section 803(2) of the New York City Charter provides:

"The Commissioner:

* * *

2. Is authorized and empowered to make any study or investigation which in his opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency."

[2] Section 813-a of the Code of Criminal Procedure provides:

"Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court . . . upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead [sic], or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice . . . may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice . . . who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest . . ."

to tap a certain telephone leased by the Department of Sanitation for the transaction of official business at the Marine Transfer Station.

Thereafter in November, 1966, the Commissioner or a deputy in the Commissioner's office questioned each of the individual plaintiffs [3] concerning his duties and employment and his activities at the Marine Transfer Station. At these hearings the employee was advised of his constitutional rights, including his right to counsel, his right to remain silent and his right not to be compelled to be a witness against himself.[4] However, the employees were further advised that:

> "[I]f you do refuse to testify or to answer any question regarding the affairs of the City or regarding your official conduct or the conduct of any other officer or employee of the City on the ground that your

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[3] The Uniformed Sanitation Men Association, Inc., is the collective bargaining representative of the employees of the Department of Sanitation.

[4] At the beginning of each of the hearings the Commissioner of Investigation made substantially the following statement:

> "Q. Mr. [name of witness], this is a private hearing being conducted by the Department of Investigation of the City of New York, pursuant to Chapter 34, of the New York City Charter. The investigation in which you are about to testify relates particularly to the affairs, functions, accounts, methods, personnel and efficiency of the Department of Sanitation of the City of New York. I wish to advise you that you have all the rights and privileges guaranteed by the laws of the State of New York and the Constitutions of this State and of the United States, including the right to remain silent and the right not to be compelled to be a witness against yourself. I wish further to advise you that anything you say can be used against you in a court of law. You have the right to have an attorney present at this hearing, if you wish, and I understand that you are represented by counsel in the person of [name of attorney], is that correct?

answer would tend to incriminate you, your term or tenure of office or employment shall terminate and you shall not be eligible to election or appointment to any office or employment under the City or any agency, in accordance with the provisions of Section 1123 of the New York City Charter."[5]

They were also told that, under the judicially authorized wiretap, recordings had been made of their conversations on the Marine Transfer Station telephone.

Twelve of the plaintiffs, asserting the constitutional privilege against self-incrimination (see *Malloy* v. *Hogan*, 378 U. S. 1 (1964)), refused to testify, three answered the questions put to them and did not assert the privilege, and one refused to testify claiming to be incompetent.[6] On December 2, 1966 all the appellants were suspended by the defendant Commissioner of Sanitation. The twelve who had invoked the privilege against self-incrimination were ad-

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[5] Section 1123 of the New York City Charter provides:

"Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any such officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

[6] The parties agree that since the charges against this employee have been withdrawn his case is now moot.

vised that their suspensions were based on their refusals to testify as provided by Section 1123 of the City Charter. The other appellants were advised by the Commissioner of Sanitation that their suspensions were "based upon information received from the Commissioner of Investigation concerning irregularities arising out of your employment in the Department of Sanitation."

Appellants sought a declaratory judgment that the suspensions under Section 1123 of the City Charter violate their rights under the Fifth and Fourteenth Amendments to the United States Constitution and that the wiretapping authorized by Section 813-a of the New York Code of Criminal Procedure violates the Federal Communications Act of 1934, 47 U. S. C. § 605 [7] and also impairs their rights under the Fourteenth Amendment. They ask for an injunction reinstating them to their positions and prohibiting defendants from continuing the wiretap and from using against them information obtained by wiretapping.

What we have said constitutes the factual background of the case as it appears in the record and as it was pre-

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[7] Section 605 of 47 U. S. C. provides:

"*Unauthorized publication or use of communications.*

. . . [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. . . ."

sented to the district court. It is important, however, to consider certain events which have occurred since the district court's decision was rendered and about which there is no dispute.

While the case was pending in the district court formal charges were issued against the appellants under Section 75 of the New York Civil Service Law.[8] In accordance with the requirements of that statute, disciplinary hearings were held at which appellants were represented by counsel. The twelve appellants who had invoked the privilege against self-incrimination were dismissed from their positions after these hearings. The evidence on which the dismissals were based consisted of the transcripts of the

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[8] Section 75 of the Civil Service Law provides in pertinent part:

"*Removal and other disciplinary action*

1. Removal or disciplinary action. A person described in . . . this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

* * *

2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such office or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall allow him to summon witnesses in his behalf. . . . "

proceedings before the Commissioner of Investigation in which the appellants had asserted the privilege. Section 1123 of the City Charter was cited as the legal basis for the dismissals.

The other three employees, originally charged with having engaged in irregularities during the course of their employment, were summoned before the grand jury and asked to sign waivers of immunity. When they refused the Department of Sanitation served them with amended charges alleging that by refusing to waive their immunity they had violated Section 1123. After hearings pursuant to Section 75 of the Civil Service Law, they too were discharged for having violated Section 1123.

It may well be argued that the action should have been dismissed by the district court on the ground that plaintiffs had failed to exhaust their administrative remedies. However we would be taking a futilely overtechnical position if we refused to consider the administrative action taken since the district court rendered its decision. In the light of that action we cannot uphold dismissal on the ground of failure to exhaust administrative remedies.

I.

Appellants contend that they have been deprived of their constitutional privilege against self-incrimination because, under Section 1123, they were compelled "either to forfeit their jobs or to incriminate themselves," citing *Garrity* v. *New Jersey*, 385 U. S. 493 (1967).

The district court abstained from deciding this issue on the ground that the Section should first be construed by the state courts. Cf. *Holland* v. *Hogan*, 67 Civ. 1223, decided June 27, 1967 (statutory three-judge court). After the district court's decision and while the present appeal was pending the New York Court of Appeals decided the case of *Gardner* v. *Broderick*, — N. Y. 2d —, — N.E. 2d,

—, — N. Y. S. 2d — (1967), the opinion in which authoritatively construed Section 1123. The *Gardner* case removed any ground there may have been for federal abstention.

We are therefore faced with the issue on appeal as to whether city employees who refuse to answer questions as to their conduct in office and who plead their privilege against self-incrimination are constitutionally protected against discharge. The answer seems to us to be clear. It was surely proper for a city official charged with the duty to do so to investigate charges of misfeasance in the operation of the Sanitation Department and in connection with such an investigation to question employees about their participation in activity which reflected the possibility of bribery and embezzlement. Can there be any reasonable doubt that an employee, especially one who has been warned of the consequences of his refusal to answer, can be (and, indeed, should be) discharged for such refusal?

An employee's "failure to give information which . . . the State has a legitimate interest in securing" constitutes insubordination. *Nelson* v. *County of Los Angeles*, 362 U. S. 1, 7 (1960).

There was no invasion of appellants' constitutional rights when they were dismissed from their employment for refusing to answer questions as to their conduct of their jobs.

Garrity v. *New Jersey, supra*, does not support appellants' position. In *Garrity* the Supreme Court held that testimony which was coerced by threat of loss of employment could not be used in a subsequent criminal proceeding. That holding has no application to the present case where the employees did not testify, but relied upon their claims of privilege.

II.

We also hold that appellants' claim based on the Commissioner's wiretap was properly dismissed. No violation of the Federal Communications Act, 47 U. S. C. § 605 (reprinted in note 6, *supra*), or deprivation of rights under the Fourth Amendment has been established.

The telephone on which appellants' conversations were overheard was leased by the City of New York and assigned to the Department of Sanitation for the conduct of its official business. There was no invasion of appellants' right of privacy since the telephone was not a private telephone nor did it belong to appellants.

The "search" was not unreasonable within the meaning of the Fourth Amendment. The conversations overheard were being conducted in the course of the discharge of appellants' official duties. The content of these conversations is analogous in some ways to official documents which are not protected against such a search.

> "[I]n the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction. If he has embezzeld the public moneys and fasified the public accounts he cannot seal his official records and withhold them from the prosecuting authorities on a plea of constitutional privilege against self-incrimination." *Wilson* v. *United States*, 221 U. S. 361, 380 (1911). See *Davis* v. *United States*, 328 U. S. 582 (1946).

In *United States* v. *Collins*, 349 F. 2d 863 (2d Cir. 1965), cert. denied, 383 U. S. 960 (1966), objection was raised on

constitutional grounds to the introduction of evidence of mail theft where the evidence was obtained from a search of defendant's work jacket. We said at p. 868:

> "We hold, then, that, in the circumstances of this case, the search by government agents who were investigating the theft of property connected with the defendant's employment, of defendant's work jacket hanging in a public area in the Government office where he was employed, was reasonable within the intendment of the Fourth Amendment and, therefore, not unconstitutional." See also *State* v. *Giardina*, 27 N.J. 313 (1958).

In our view the recent decision of the Supreme Court in *Berger* v. *New York*, 388 U. S. 41 (1967), has no bearing on the present case. In the *Berger* case "'trespassory intrusions into private, constitutionally protected premises'" were claimed. The protection of privacy is not involved in our case where the conversations overheard were carried on in the course of the city's business over a telephone leased by the city for the purpose of such official use.

In *Berger* the Court held that the procedure prescribed by § 813-a of the New York Code of Criminal Procedure was constitutionally insufficient, under the circumstances there presented, to justify the use in criminal proceedings of the evidence secured by eavesdropping. We hold in the case now before us only that, if resort to § 813-a was necessary at all, the provisions of that Section provide whatever protection is needed for monitoring the conversations of the employees and for the use to which the monitored conversations were put.

The action of the district court in dismissing the complaint for failure to state a claim on which relief can be granted is affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of September one thousand nine hundred and sixty-seven.

Present:

HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
Circuit Judges,

HON. JOHN F. DOOLING, JR.,
District Judge.

UNIFORMED SANITATION MEN ASSOCIATION, INC., LEONARD MONTELEONE, AUGUST MASCIA, JOSEPH MIRANDA, NUNZIO CHIERICO, BERNARD F. BELLETTIERE, NICHOLAS J. CARUSO, ANSELMO QUINONES, ANTHONY CALABRESE, JAMES D. MINTER, MARCUS F. KING, JOSEPH BARBARA, PETER I. LOMBARDO, PHILIP D'AGOSTINO, ANTHONY D'AMBROSIO, JOHN L. ALESSIO and MICHAEL A. MANGO,

Plaintiffs-Appellants,

v.

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, COMMISSIONER OF INVESTIGATION OF THE CITY OF NEW YORK, and the CITY OF NEW YORK,

Defendants-Appellees.

Judgment

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO
Clerk

Order Allowing Certiorari

SUPREME COURT OF THE UNITED STATES

No. 823 – , October Term, 1967

UNIFORMED SANITATION MEN ASSOCIATION, INC., et al.,

Petitioners,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, et al.,

Respondents.

ORDER ALLOWING CERTIORARI. January 29, 1968.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is placed on the summary calendar and set for oral argument immediately following No. 673.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

October Term, 1967

No. 823

UNIFORMED SANITATION MEN ASSOCIATION, INC., ET AL.,

Petitioners,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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DORIAN BOWMAN,
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Supreme Court of the United States

October Term, 1967

No.

UNIFORMED SANITATION MEN ASSOCIATION, INC., *et al.*,
Petitioners,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered herein on September 20, 1967.

Opinions Below

The opinion of the Court of Appeals, as yet unreported, appears at Appendix B, *infra*, pp. 4a-14a. The opinion of the District Court is unreported and appears at Appendix D, *infra*, pp. 17a-20a.

Jurisdiction

The judgment of the Court of Appeals was entered on September 20, 1967 and appears at Appendix C, *infra*, pp. 15a-16a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Were the dismissals from employment of the individual petitioners, pursuant to Section 1123 of the New York City Charter, in violation of their privilege against self-incrimination, their right to due process and their immunities and privileges under the Fourteenth Amendment?

2. Are dismissals from public employment, resulting from wiretapping of the employees' telephone conversations without the participants' consent, unlawful because the wiretapping violated the Federal Communications Act of 1934, 47 U.S.C. § 605, the employees' constitutional right to privacy and the prohibition against unlawful search and seizure under the Fourth and Fourteenth Amendments?

Constitutional Provisions and Statutes Involved

The constitutional provisions involved are Article I, Section 10; Article VI, Clause 2; and the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution.

The federal statute involved is the Federal Communications Act of 1934, 47 U.S.C. § 605, Appendix A, *infra*, p. 1a.

The state provisions are Section 1123 of the New York City Charter, *infra*, p. 2a and New York Code of Criminal Procedure, Section 813-a, *infra*, p. 3a.

Statement of the Case

In November, 1966 the Commissioner of Investigation of the City of New York conducted an investigation of employees of the Department of Sanitation in the course of which he placed a wiretap upon the telephone at the employees' place of employment pursuant to an order of the New York Supreme Court and intercepted, recorded

and divulged their conversations (R. 7a).[1] In the same month he directed each of the individual petitioners employed by the Department of Sanitation to appear before him; charged them, in separate hearings, with criminal behavior; and informed them that he had recordings of their telephone conversations, some of which he played back to them (R. 7a).

The Commissioner also informed the petitioners that they were entitled to assert their constitutional privilege against self-incrimination, but that if they did so they would be dismissed from employment pursuant to Section 1123 of the New York City Charter, *infra,* p. 18a. Twelve of the petitioners asserted their privilege against self-incrimination, *ibid.* The Commissioner of Sanitation then suspended them for invoking the privilege, *ibid.*, served them with charges to the same effect and dismissed them after a hearing in which the only evidence against them was their assertion of the constitutional privilege in the proceedings before the Commissioner of Investigation, *infra,* pp. 10a-11a. The notices of dismissal all stated that they were dismissed pursuant to Section 1123 of the New York City Charter for asserting their privilege, *infra,* p. 11a.

Three other petitioners who answered the Commissioner of Investigation's questions denied their guilt and were suspended on December 2, 1966 by the Commissioner of Sanitation by reason of "information received from the Commissioner of Investigation concerning irregularities arising out of your employment in the Department of Sanitation" (R. 7a). At the suggestion of the District Attorney the Department of Sanitation requested these employees to postpone their hearings upon the charges of irregularities filed against them. When the employees refused to postpone their disciplinary hearings, they were

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[1] References designated "R." refer to the Joint Appendix in the Court of Appeals, one copy of which has been filed in this Court simultaneously with this petition.

summoned by the District Attorney before the grand jury and asked to sign waivers of immunity which they declined to do, *infra*, p. 11a.

These employees were then served with amended charges by the Department of Sanitation to the effect that they had violated Section 1123 of the Charter by their refusal to waive immunity before the grand jury, *ibid.* In hearings conducted before a Deputy Commissioner of that Department, the latter proceeded solely upon the amendment to the charges relating to the refusal to waive immunity and not upon the original charges of irregularities. On February 9, 1967 the Commissioner of Sanitation dismissed the three employees from their employment, in accordance with Section 1123 of the New York City Charter, solely because they had refused to execute waivers of immunity before the grand jury, *ibid.*

The petitioners, including the collective bargaining agent for most of them, thereupon instituted an action for a declaratory judgment that the suspensions and discharges were illegal because Section 1123 of the Charter violated the employees' rights under the Fifth and Fourteenth Amendments to the United States Constitution and because the wiretapping violated the Federal Communications Act of 1934, 47 U.S.C. § 605, and impaired their right to privacy and their right against unlawful search and seizure under the Fourteenth Amendment (R. 9a-10a). They also sought discovery and an injunction against the continuation of such illegal conduct (R. 10a).

The district court denied petitioners' motion for preliminary injunction and for discovery, and granted the respondents' motion to dismiss the complaint, declining to exercise jurisdiction on the basis of the abstention doctrine, *infra*, p. 19a. It emphasized that its decision "is in no manner a determination by this court that Section 813-a of the New York Code of Criminal Procedure and Section 1123 of the Charter of the City of New York are constitutional."

Infra, p. 20a. It added that "[t]his court is confident that the state courts of New York are sensitive to and will give careful consideration to the very serious constitutional issues that the plaintiffs have raised herein", *ibid.*

The Court of Appeals decided the case upon the merits because of further administrative action taken in the Department of Sanitation since the district court's decision and because an intervening decision of the New York Court of Appeals had "removed any ground there may have been for federal abstention", *infra*, p. 12a. It affirmed the dismissal of the complaint holding (i) that petitioners had no constitutional privilege against self-incrimination to refuse "to answer questions as to their conduct in office", *ibid.*, and (ii) that the wiretapping had violated neither the Federal Communications Act, 47 U.S.C. §605 nor petitioners' constitutional rights, *infra*, p. 13a.

Reasons for Granting Writ

I. The Decision Below, in Direct Conflict With This Court's Decision in *Slochower* v. *Board of Education*, 350 U.S. 551, upholds the Automatic Termination of Public Employment Upon Invocation of the Privilege Against Self-Incrimination.

1. The decision below is squarely in conflict with this Court's decision in *Slochower* v. *Board of Education*, 350 U.S. 551, which held that Section 903 of the New York City Charter, as interpreted and applied by the New York courts, violated the due process clause of the Fourteenth Amendment. That section (identical in language with the present Section 1123) provided that where any city employee refused to testify concerning city affairs "on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution . . . his term or tenure of office or employment shall terminate."

The New York Court of Appeals in *Daniman* v. *Board of Education of the City of New York*, 306 N.Y. 532, 119 N.E. 2d 373 (1954), *appeal dismissed* 348 U.S. 993, had construed Section 903 as providing for the automatic dismissal of City employees who assert their privilege against self-incrimination:

> "The assertion of the privilege against self-incrimination is equivalent to a resignation. . . . There is nothing novel about such a statute. Other statutes provide for the vacatur of, or forfeiture of, an office or employment upon the happening of an event specified therein." *Id.* at 538, 539.

In *Slochower*, this Court reversed the New York Court of Appeals, holding that "[t]he heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive. Such action falls squarely within the prohibition of *Wieman* v. *Updegraff, supra.*" *Id.* at 558.

Despite the Court's direct holding in *Slochower* that Section 903 was unconstitutional, Section 1123, identical in language with Section 903, was enacted in November 1961. This section was the basis for the warning by the Commissioner of Investigation that if any employee asserted his constitutional privilege, he would be dismissed from his employment; and indeed twelve employees were dismissed for asserting their constitutional privilege, while the remaining three were dismissed for refusing to waive immunity before a grand jury. The court below, in spite of the controlling effect of *Slochower*, did not even mention that decision.

2. The decision below also appears to be inconsistent with a line of decisions in this Court subsequent to *Slochower* holding that the Fourteenth Amendment prohibits not only arbitrary and summary dismissal from public employment but also compulsory self-incrimination

by the states. In *Malloy* v. *Hogan,* 378 U.S. 1, 6, the Court enunciated the rule that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States." This principle has been affirmed and upheld by the Court in subsequent decisions, *Murphy* v. *Waterfront Commission of New York Harbor,* 378 U.S. 52; *Stevens* v. *Marks,* 383 U.S. 234; *Spevack* v. *Klein,* 385 U.S. 511; and *Garrity* v. *State of New Jersey,* 385 U.S. 493.

In *Garrity,* the Court held it to be a violation of the Fourteenth Amendment to admit into evidence in a criminal proceeding the statements of police officers obtained from them under a state statute that compelled them to make such statements or to be discharged from employment. The Court said that "[t]he option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." *Garrity* v. *New Jersey, supra,* at 497.

In distinguishing the celebrated statement of Mr. Justice Holmes in *McAuliffe* v. *New Bedford,* 155 Mass. 216, 29 N.E. 517 (1892), that one "has no constitutional right to be a policeman", the Court said that "[o]ur question is whether the Government, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee", *Garrity* v. *New Jersey, supra,* at 499, and it concluded that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Id.* at 500.

In *Spevack* v. *Klein,* 385 U.S. 511, the Court held that the disbarment of a New York attorney for refusing to testify and produce records in a state judicial inquiry into unethical practices violated his constitutional guarantee against self-incrimination under the Fourteenth Amendment. The Court, overruling its earlier decision in *Cohen* v. *Hurley,* 366 U.S. 117, said that it found "no room in the

privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others." *Spevack* v. *Klein, supra,* at 516.

The court below sought to distinguish only one of these cases—*Garrity* v. *New Jersey, supra,*—by stating that its "holding has no application to the present case where the employees did not testify, but relied upon their claims of privilege", *infra,* p. 12a. While it is true that *Garrity* involved the use in a criminal proceeding of "testimony which was coerced by threat of loss of employment", *ibid.*, the principle upon which it stands is undermined by the court's decision below. If the fruits of an illegal coercion cannot be used in a criminal proceeding, surely the employee cannot be dismissed for refusing to yield to such coercion. In one case the employee yields to the coercion and perhaps incriminates himself, and in the other case he does not yield and is dismissed from employment.

3. The instant case, if not governed as we believe by this Court's decision in *Slochower* striking down the Charter provision as unconstitutional, would then present a broader issue: whether even absent such a statute automatically terminating public employment upon assertion of the constitutional privilege, an employee may be dismissed for invoking it in an investigation into his official conduct.

This is the issue which this Court expressly left open in *Spevack* v. *Klein, supra,* at 516, when it found it unnecessary to decide "[w]hether a policeman, who invokes the privilege when his conduct as a police officer is questioned . . . may be discharged for refusing to testify." This certainly is an open issue of considerable public importance which should be resolved by this Court unless the instant case is decided in petitioners' favor upon the narrower ground that this case is controlled by *Slochower.*

The court below limited its consideration of the broader issue to a rhetorical question, "Can there be any reasonable

doubt that an employee, especially one who has been warned of the consequences of his refusal to answer, can be (and, indeed, should be) discharged for such refusal?", *infra*, p. 12a. In answering this question in the negative, the court below disregarded the foregoing decisions, and relied exclusively upon an erroneous construction of this Court's decision in *Nelson* v. *County of Los Angeles*, 362 U.S. 1, *infra*, p. 12a. For in *Nelson*, the Court was not reviewing a statute directed specifically at the assertion of the constitutional privilege, but was upholding one which authorized dismissal for refusing on any grounds to answer questions concerning "subversion". This Court's decision in *Nelson* is an affirmative reason for granting certiorari here since in that case the state court's decision as to the permanent employee involved was upheld without opinion by an equally divided vote in this Court.

Even with respect to the temporary employee involved in *Nelson*, this Court's decision is significant. The Court explicitly distinguished *Slochower* and Section 903 of the New York City Charter, noting that in *Nelson*, the employee "had been ordered by his employer as well as by California's law to appear and answer questions before the federal subcommittee. These mandates made no references to Fifth Amendment privileges". *Id.* at 7. It also held that "petitioner's contention as to the Privileges and Immunity Clause of the Fourteenth Amendment . . . was neither raised in nor considered by the California Courts." *Id.* at 9. On each of these points the petitioners' position here is exactly the contrary. Furthermore, since *Nelson*, this Court decided *Malloy* v. *Hogan*, *supra*, holding that there is a federal privilege against self-incrimination in proceedings before state tribunals.

We are aware of Mr. Justice Fortas' suggestion in *Spevack* v. *Klein*, *supra*, that, subject to certain constitutional limitations, he would answer affirmatively the question of whether "a policeman who invokes the privilege

when his conduct as a police officer is questioned . . . may be discharged for refusing to testify", *id.* at 629-630. That issue deserves plenary consideration by the Court which has expressly recognized that it has yet to be directly decided. *Id.* at 516. In any event, the instant case is clearly distinguishable because the employees were suspended and dismissed in the course of criminal investigations for refusing to surrender their privilege or to waive immunity against criminal prosecution.

That these were criminal investigations, rather than disciplinary proceedings by an employer, is obvious from the fact that the Commissioner of Investigation wiretapped the employees' telephone conversations pursuant to a criminal statute, conducted a hearing in the absence of their superiors, advised them of their privilege against self-incrimination, charged them with crime and turned his evidence over to the District Attorney.

4. These problems relating to the constitutional privilege are important ones which deserve to be decided directly by this Court. We think they are controlled by *Slochower;* that they present the converse of *Garrity;* and that if "lawyers also enjoy first-class citizenship", *Spevack* v. *Klein, supra,* at 628-629, the same is true of sanitation employees. Under the decision below, the privilege is meaningless for a public employee in those states which like New York direct the automatic dismissal of public employees who assert their privilege against self-incrimination.[2] If this indeed is to be the law, it is for this Court to state it and to distinguish or overrule *Slochower, Garrity* and *Spevack.* It is plain from the opinion below that the serious constitutional issues whose existence was acknowl-

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[2] Hawaii Rev. Laws § 5-4 (1955), LSA-R.S. § 33.2426, U.A.M.S. [Mo.] § 36,410 (1959), N.J. Rev. Stat. 2A:81-17.1 (Supp. 1966), N.Y. Const. Art. I, § 6, Ohio Rev. Code Ann. § 143.271 (1953), W. Va. Code § 2835 (16) (1961); Compare Cal. Gov't. Code § 1028.1, Md. Ann. Code Art. 69, § 11 (1967 Repl. Vol.).

edged by the district court, *infra*, p. 20a, were treated most superficially by the court below. The privilege is an important one in our constitutional system. This Court has consistently insisted in a variety of contexts upon the necessity of protecting its use. *Emspak* v. *United States*, 349 U.S. 190, *Quinn* v. *United States*, 349 U.S. 155, cf. *Ullmann* v. *United States*, 350 U.S. 422. There is strong reason to suggest, in the light of two decades of consideration by this Court of the privilege that, if our accusatorial system of justice is to be maintained, an employee should be discharged upon the basis of evidence presented against him rather than upon the mere assertion of the privilege.

II. The Decision Below Upholds Dismissals From Employment Resulting From Wiretapping in Violation of the Federal Communications Act of 1934 and the Employees' Constitutional Rights Under the Fourth and Fourteenth Amendments.

1. The decision below requires review by this Court because it upholds the dismissal from employment of employees as a result of wiretapping their telephone conversations. The case poses the important question of whether such wiretapping did not violate both the Federal Communications Act of 1934, 47 U.S.C. 605, and the constitutional rights of the employees under the Fourth and Fourteenth Amendments against unreasonable search and seizure and against invasion of their privacy.

2. The petitioners and those to whom they talked on the telephone plainly did not authorize the Commissioner of Investigation to intercept their conversations to use them as a basis of interrogation or to divulge them to the Commissioner of Sanitation or to the District Attorney. Thus the case is brought squarely within the statutory proscription that "no person not being authorized by the sender shall intercept any communication and divulge or publish

the existence, contents, substance, purpose, effect, or meaning of such intercepted communications to any person," 47 U.S.C. § 605. This statute has received a broad construction from this Court in view of the congressional intent to protect the conversations of persons using the telephones. See *Nardone* v. *United States*, 302 U.S. 379, 308 U.S. 338; *Goldman* v. *United States*, 316 U.S. 129; *Goldstein* v. *United States*, 316 U.S. 114; *United States* v. *Coplon*, 185 F. 2d 629 (2d Cir. 1950), *cert. denied*, 342 U.S. 920.

3. The court below concluded that the statute had not been violated because the telephone "was leased by the City of New York and assigned to the Department of Sanitation for the conduct of its official business", *infra*, p. 13a. The federal statute, however, makes no exception based upon property rights to the telephone service. See *Benanti* v. *United States*, 355 U.S. 96; *Reitmeister* v. *Reitmeister*, 162 F.2d 691 (2d Cir. 1947); *United States* v. *Polakoff*, 112 F.2d 888 (2d Cir. 1940), *cert. denied*, 311 U.S. 653.

In this important respect the decision below is in direct conflict with prior decisions of the Second Circuit and with those of the District of Columbia Circuit in the *Coplon* espionage cases where the Government was held to have illegally intercepted the telephone conversations of its own employee in the offices of the Department of Justice, *United States* v. *Coplon, supra; Coplon* v. *United States*, 191 F.2d 749 (D.C. Cir. 1950), *cert. denied*, 342 U.S. 926.

4. Beyond the statutory proscription, this case presents the even more important claim that the wiretapping constituted an unreasonable search and seizure and an intrusion into petitioners' privacy in violation of their constitutional rights under the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

In *Olmstead* v. *United States*, 277 U.S. 438, a case arising prior to the passage of the Federal Communications Act,

Justices Brandeis, Holmes, Stone and Butler, in three separate opinions, dissented from an affirmance of a criminal conviction based upon evidence obtained by wiretapping.

The majority view in *Olmstead* has never been expressly repudiated by this Court. But the weighty authority of the dissenters together with the failure of the Court to rely upon *Olmstead* in recent years makes it appropriate for the Court to consider in this case the adoption of the *Olmstead* dissent. The latest case to cite *Olmstead* with approval was *Goldman* v. *United States, supra,* decided 25 years ago, in which Justices Stone and Frankfurter filed a concurring opinion, stating:

> "Had a majority of the Court been willing at this time to overrule the Olmstead case, we should have been happy to join them. But as they have declined to do so, and we think this case is indistinguishable in principle from Olmstead's, we have no occasion to repeat here the dissenting views in that case with which we agree." *Id.* at 136.

There was a separate dissent by Justice Murphy in an opinion based explicitly on the Fourth Amendment which concluded that "the Olmstead case was wrong", *id.* at 141.

More recently, in *Silverman* v. *United States,* 365 U.S. 505, this Court had occasion to consider the effect of *Olmstead* in a situation where an electronic listening device touched heating ducts in a house occupied by the petitioners. In reversing the petitioners' convictions, the majority of the Court did not affirm the validity of *Olmstead;* instead, it distinguished *Olmstead* by noting the "absence of a physical invasion of the petitioner's premises," *Silverman* v. *United States, supra,* at 510.

The wiretapping also violated the Fourteenth Amendment because the use made of it by the Commissioner of Investigation transgressed the standards of due process

required of the states under the Fourteenth Amendment; *cf.* the dissenting opinion of Circuit Judge Washington in *Silverman* v. *United States,* 275 F.2d 173, 178 (D. C. Cir. 1960), *rev'd,* 365 U.S. 505. The Commissioner used the wiretap recordings to support his accusations of crime and to put undue pressure upon these untutored employees. Once he played the recordings to them, it was a foregone conclusion that most of them would assert their constitutional privilege, thus requiring their automatic dismissals under Section 1123 of the City Charter.

5. The court below held that there was "no invasion of appellants' right of privacy since the telephone was not a private telephone nor did it belong to appellants", *infra,* p. 13a. The determinative issue for constitutional as well as statutory purposes, *supra,* at p. 12, however, is not the ownership of the telephone, but the privacy of the conversations. The lower court's reasoning is clearly in conflict with this Court's recent statement that "[w]e have recognized that the principal object of the Fourth Amendment is the protection of privacy, rather than property and have increasingly discarded fictional and procedural barriers rested on property concepts", *Warden, Maryland Penitentiary* v. *Hayden,* 387 U.S. 294, 304. See also *Berger* v. *United States,* 388 U.S. 41; *Camara* v. *Municipal Court,* 387 U.S. 523; *See* v. *City of Seattle,* 387 U.S. 541; *Griswold* v. *Connecticut,* 381 U.S. 479. Petitioners were entitled to freedom from search and seizure in their offices under the Court's decisions which have protected offices, *Gouled* v. *United States,* 255 U.S. 298, stores, *Davis* v. *United States,* 328 U.S. 582, automobiles and taxis, *Henry* v. *United States,* 361 U.S. 98, *Rios* v. *United States,* 364 U.S. 253.

6. The court below was also clearly in error when it held that the search (by wiretapping) was not unreasonable

because "[t]he conversations were being conducted in the course of the discharge of appellants' official duties." *Infra,* p. 13a. The attempted analogy to "public records and official documents made or kept in the administration of public office," *ibid.,* quoting from *Wilson* v. *United States,* 221 U.S. 361, is strained since there is an obvious difference between wiretapping a private telephone conversation which might disclose dereliction of the employee's duties and subpoenaing public record belonging to the government.

7. Aside from the clear error of the court below, its decision should be reviewed because it is in direct conflict with this Court's recent decision in *Berger* v. *New York, supra,* declaring unconstitutional Section 813-a of the New York Code of Criminal procedure, which section served as the basis for the wiretapping in the instant case.

The court below misread *Berger* when it limited that decision to wiretaps and eavesdropping on private premises. This Court in *Berger* made it plain that it was declaring Section 813-a unconstitutional on its face:

> "We have concluded that the language of New York's statute is too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area and is, therefore, violative of the Fourth and Fourteenth amendments." *Id.* at 44.

After analyzing the procedures set forth under the statute, the Court concluded:

> "New York's broadside authorization rather than being 'carefully circumscribed' so as to prevent unauthorized invasions of privacy actually permits general searches by electronic devices, the truly offensive character of which was first condemned in *Entick* v. *Carrington,* 19 How. St. Tr. 1029, *supra,* and which were then known as 'general warrants.'" *Id.* at 58.

and

> "In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures." *Id.* at 60.

Indeed, the concurring opinions of Justices Douglas, and Stuart, *id.* at 64 and 68, and the dissenting opinions of Justices Black, Harlan and White, *id.* at 71, 91 and 107, explicitly recognize that the Court was declaring New York's statute unconstitutional on its face. The opinions in *Berger* leaves no room for the distinction sought to be drawn by the court below.

The delegates to the 1967 New York State Constitutional Convention, in debating whether or not to include a provision on wiretapping and eavesdropping in the proposed new state constitution, recognized that the *Berger* decision had eliminated New York's statute. For example, Judge Desmond stated:

> "[T]he Berger decision of the United States Supreme Court in June . . . held that the present eavesdropping-wiretapping law in this State is unconstitutional for many, many reasons. This means, of course, that presently there is no eavesdropping or wiretapping law in the State of New York."[3]

Finally, the intimation of the court below, *infra*, p. 14a, that perhaps wiretapping could have been engaged in without resort to Section 813-a is a novel one not suggested by the litigants and totally inconsistent with the Commissioner of Investigation's application to the State Supreme Court under the wiretapping statute.

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[3] Debates, New York State Constitutional Convention, p. 3725 (Aug. 29, 1967); see also statements by Mr. Tyler, p. 3712 (Aug. 29, 1967), Mr. Bartlett, p. 3738 (Aug. 29, 1967), Mr. Bromberg, pp. 3786-7 (Aug. 29, 1967), Judge Hogan, p. 3802 (Aug. 29, 1967), Mr. Blatt, p. 3825 (Aug. 29, 1967), District Attorney Koota, p. 3866 (Aug. 29, 1967), Judge Sobel, p. 6632 (Sept. 19, 1967).

8. The wiretapping engaged in here calls for review by this Court because it is part of a pattern of increasing governmental surveillance of public employees and other citizens. See *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. (1965); *Hearings on S. 928 Before a Subcommittee of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. (1967). New techniques have been developed which have greatly aided in this surveillance, techniques which have led to an invasion of traditional areas of individual privacy. Effective measures to protect this privacy have not kept pace with the new techniques of surveillance. See *Westin, Privacy and Freedom* (1967). If privacy is to have continued meaning in our society it is imperative that the wiretapping engaged in here be condemned.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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November 13, 1967.

APPENDIX A

Statutes

FEDERAL COMMUNICATIONS ACT OF 1934, 47 U.S.C. § 605: Unauthorized publication or use of communications.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena (sic) issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

Appendix A—Statutes

NEW YORK CITY CHARTER, § 1123: Failure to testify.

If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.

Appendix A—Statutes

NEW YORK CODE OF CRIMINAL PROCEDURE, § 813-a: Ex parte order for eavesdropping.

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same.

APPENDIX B

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 381—September Term, 1966.

(Argued March 23, 1967 Decided September 20, 1967.)

Docket No. 31014

UNIFORMED SANITATION MEN ASSOCIATION, INC., LEONARD MONTELEONE, AUGUST MASCIA, JOSEPH MIRANDA, NUNZIO CHIERICO, BERNARD F. BELLETTIERE, NICHOLAS J. CARUSO, ANSELMO QUINONES, ANTHONY CALABRESE, JAMES D. MINTER, MARCUS F. KING, JOSEPH BARBARA, PETER I. LOMBARDO, PHILIP D'AGOSTINO, ANTHONY D'AMBROSIO, JOHN L. ALESSIO and MICHEAL A. MANGO,

Plaintiffs-Appellants,

—v.—

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, COMMISSIONER OF INVESTIGATION OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK,

Defendants-Appellees.

Before:

MOORE and HAYS, *Circuit Judges,* and DOOLING, *District Judge.**

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* Of the Eastern District of New York, sitting by designation.

Appendix B—Opinion of the Court of Appeals

Appeal from an order of the United States District Court for the Southern District of New York, John M. Cannella, *Judge,* denying plaintiffs' motions for a preliminary injunction and discovery and granting defendants' motion to dismiss the complaint in an action to enjoin defendants from violating plaintiffs' constitutional rights.

Affirmed.

LEONARD B. BOUDIN (Victor Rabinowitz, of counsel, Rabinowitz & Boudin, Morris Weissberg, and John J. DeLury, New York, New York, on the brief), *for Appellants.*

JOHN J. LOFLIN (Frederick S. Nathan and Robert C. Dinerstein, of counsel, J. Lee Rankin, Corporation Counsel of the City of New York, on the brief), *for Appellees.*

HAYS, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Southern District of New York in an action to enjoin defendants from violating plaintiffs' constitutional rights, denying plaintiffs' motion for summary judgment and granting defendants' motion to dismiss the complaint. We affirm the dismissal of the complaint, although on grounds different from those on which the district court relied.

There is no dispute as to the material facts. Some time in 1966 the defendant Commissioner of Investigation of the City of New York was informed that employees in the Department of Sanitation were not charging private cartmen the proper fees for use of City facilities at the Marine Transfer Station, located at 91st Street and the East River in Manhattan, and that these employees were diverting to

themselves the proceeds of the fees they did charge, thus causing the City to lose hundreds of thousands of dollars of revenue. Exercising his powers under Section 803(2) of the New York City Charter,[1] the Commissioner undertook an investigation of these irregularities. He obtained a court order in the Supreme Court, New York County, under the provisions of Section 813-a of the Code of Criminal Procedure of the State of New York,[2] authorizing him

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[1] Section 803(2) of the New York City Charter provides:

"The Commissioner:

* * *

2. Is authorized and empowered to make any study or investigation which in his opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency."

[2] Section 813-a of the Code of Criminal Procedure provides:

"Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court . . . upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead [sic], or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice . . . may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice . . . who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest . . ."

to tap a certain telephone leased by the Department of Sanitation for the transaction of official business at the Marine Transfer Station.

Thereafter in November, 1966, the Commissioner or a deputy in the Commissioner's office questioned each of the individual plaintiffs [3] concerning his duties and employment and his activities at the Marine Transfer Station. At these hearings the employee was advised of his constitutional rights, including his right to counsel, his right to remain silent and his right not to be compelled to be a witness against himself.[4] However, the employees were further advised that:

> "[I]f you do refuse to testify or to answer any question regarding the affairs of the City or regarding your official conduct or the conduct of any other officer or employee of the City on the ground that your

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[3] The Uniformed Sanitation Men Association, Inc., is the collective bargaining representative of the employees of the Department of Sanitation.

[4] At the beginning of each of the hearings the Commissioner of Investigation made substantially the following statement:

> "Q. Mr. [name of witness], this is a private hearing being conducted by the Department of Investigation of the City of New York, pursuant to Chapter 34, of the New York City Charter. The investigation in which you are about to testify relates particularly to the affairs, functions, accounts, methods, personnel and efficiency of the Department of Sanitation of the City of New York. I wish to advise you that you have all the rights and privileges guaranteed by the laws of the State of New York and the Constitutions of this State and of the United States, including the right to remain silent and the right not to be compelled to be a witness against yourself. I wish further to advise you that anything you say can be used against you in a court of law. You have the right to have an attorney present at this hearing, if you wish, and I understand that you are represented by counsel in the person of [name of attorney], is that correct?

answer would tend to incriminate you, your term or tenure of office or employment shall terminate and you shall not be eligible to election or appointment to any office or employment under the City or any agency, in accordance with the provisions of Section 1123 of the New York City Charter."[5]

They were also told that, under the judicially authorized wiretap, recordings had been made of their conversations on the Marine Transfer Station telephone.

Twelve of the plaintiffs, asserting the constitutional privilege against self-incrimination (see *Malloy* v. *Hogan*, 378 U. S. 1 (1964)), refused to testify, three answered the questions put to them and did not assert the privilege, and one refused to testify claiming to be incompetent.[6] On December 2, 1960 all the appellants were suspended by the defendant Commissioner of Sanitation. The twelve who had invoked the privilege against self-incrimination were ad-

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[5] Section 1123 of the New York City Charter provides:

"Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any such officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

[6] The parties agree that since the charges against this employee have been withdrawn his case is now moot.

vised that their suspensions were based on their refusals to testify as provided by Section 1123 of the City Charter. The other appellants were advised by the Commissioner of Sanitation that their suspensions were "based upon information received from the Commissioner of Investigation concerning irregularities arising out of your employment in the Department of Sanitation."

Appellants sought a declaratory judgment that the suspensions under Section 1123 of the City Charter violate their rights under the Fifth and Fourteenth Amendments to the United States Constitution and that the wiretapping authorized by Section 813-a of the New York Code of Criminal Procedure violates the Federal Communications Act of 1934, 47 U. S. C. § 605 [7] and also impairs their rights under the Fourteenth Amendment. They ask for an injunction reinstating them to their positions and prohibiting defendants from continuing the wiretap and from using against them information obtained by wiretapping.

What we have said constitutes the factual background of the case as it appears in the record and as it was pre-

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[7] Section 605 of 47 U. S. C. provides:

"Unauthorized publication or use of communications.

. . . [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. . . . "

sented to the district court. It is important, however, to consider certain events which have occurred since the district court's decision was rendered and about which there is no dispute.

While the case was pending in the district court formal charges were issued against the appellants under Section 75 of the New York Civil Service Law.[8] In accordance with the requirements of that statute, disciplinary hearings were held at which appellants were represented by counsel. The twelve appellants who had invoked the privilege against self-incrimination were dismissed from their positions after these hearings. The evidence on which the dismissals were based consisted of the transcripts of the

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[8] Section 75 of the Civil Service Law *provides in pertinent part:*

"Removal and other disciplinary action

1. Removal or disciplinary action. A person described in . . . this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

* * *

2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such office or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall allow him to summon witnesses in his behalf. . . ."

proceedings before the Commissioner of Investigation in which the appellants had asserted the privilege. Section 1123 of the City Charter was cited as the legal basis for the dismissals.

The other three employees, originally charged with having engaged in irregularities during the course of their employment, were summoned before the grand jury and asked to sign waivers of immunity. When they refused the Department of Sanitation served them with amended charges alleging that by refusing to waive their immunity they had violated Section 1123. After hearings pursuant to Section 75 of the Civil Service Law, they too were discharged for having violated Section 1123.

It may well be argued that the action should have been dismissed by the district court on the ground that plaintiffs had failed to exhaust their administrative remedies. However we would be taking a futilely overtechnical position if we refused to consider the administrative action taken since the district court rendered its decision. In the light of that action we cannot uphold dismissal on the ground of failure to exhaust administrative remedies.

I.

Appellants contend that they have been deprived of their constitutional privilege against self-incrimination because, under Section 1123, they were compelled "either to forfeit their jobs or to incriminate themselves," citing *Garrity* v. *New Jersey*, 385 U. S. 493 (1967).

The district court abstained from deciding this issue on the ground that the Section should first be construed by the state courts. Cf. *Holland* v. *Hogan*, 67 Civ. 1223, decided June 27, 1967 (statutory three-judge court). After the district court's decision and while the present appeal was pending the New York Court of Appeals decided the case of *Gardner* v. *Broderick*, — N. Y. 2d —, — N.E. 2d,

—, — N. Y. S. 2d — (1967), the opinion in which authoritatively construed Section 1123. The *Gardner* case removed any ground there may have been for federal abstention.

We are therefore faced with the issue on appeal as to whether city employees who refuse to answer questions as to their conduct in office and who plead their privilege against self-incrimination are constitutionally protected against discharge. The answer seems to us to be clear. It was surely proper for a city official charged with the duty to do so to investigate charges of misfeasance in the operation of the Sanitation Department and in connection with such an investigation to question employees about their participation in activity which reflected the possibility of bribery and embezzlement. Can there be any reasonable doubt that an employee, especially one who has been warned of the consequences of his refusal to answer, can be (and, indeed, should be) discharged for such refusal?

An employee's "failure to give information which . . . the State has a legitimate interest in securing" constitutes insubordination. *Nelson* v. *County of Los Angeles*, 362 U. S. 1, 7 (1960).

There was no invasion of appellants' constitutional rights when they were dismissed from their employment for refusing to answer questions as to their conduct of their jobs.

Garrity v. *New Jersey, supra,* does not support appellants' position. In *Garrity* the Supreme Court held that testimony which was coerced by threat of loss of employment could not be used in a subsequent criminal proceeding. That holding has no application to the present case where the employees did not testify, but relied upon their claims of privilege.

II.

We also hold that appellants' claim based on the Commissioner's wiretap was properly dismissed. No violation of the Federal Communications Act, 47 U. S. C. § 605 (reprinted in note 6, *supra*), or deprivation of rights under the Fourth Amendment has been established.

The telephone on which appellants' conversations were overheard was leased by the City of New York and assigned to the Department of Sanitation for the conduct of its official business. There was no invasion of appellants' right of privacy since the telephone was not a private telephone nor did it belong to appellants.

The "search" was not unreasonable within the meaning of the Fourth Amendment. The conversations overheard were being conducted in the course of the discharge of appellants' official duties. The content of these conversations is analogous in some ways to official documents which are not protected against such a search.

> "[I]n the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction. If he has embezzeld the public moneys and fasified the public accounts he cannot seal his official records and withhold them from the prosecuting authorities on a plea of constitutional privilege against self-incrimination." *Wilson* v. *United States*, 221 U. S. 361, 380 (1911). See *Davis* v. *United States*, 328 U. S. 582 (1946).

In *United States* v. *Collins*, 349 F. 2d 863 (2d Cir. 1965), cert. denied, 383 U. S. 960 (1966), objection was raised on

constitutional grounds to the introduction of evidence of mail theft where the evidence was obtained from a search of defendant's work jacket. We said at p. 868:

> "We hold, then, that, in the circumstances of this case, the search by government agents who were investigating the theft of property connected with the defendant's employment, of defendant's work jacket hanging in a public area in the Government office where he was employed, was reasonable within the intendment of the Fourth Amendment and, therefore, not unconstitutional." See also *State* v. *Giardina*, 27 N.J. 313 (1958).

In our view the recent decision of the Supreme Court in *Berger* v. *New York*, 388 U. S. 41 (1967), has no bearing on the present case. In the *Berger* case "trespassory intrusions into private, constitutionally protected premises" were claimed. The protection of privacy is not involved in our case where the conversations overheard were carried on in the course of the city's business over a telephone leased by the city for the purpose of such official use.

In *Berger* the Court held that the procedure prescribed by § 813-a of the New York Code of Criminal Procedure was constitutionally insufficient, under the circumstances there presented, to justify the use in criminal proceedings of the evidence secured by eavesdropping. We hold in the case now before us only that, if resort to § 813-a was necessary at all, the provisions of that Section provide whatever protection is needed for monitoring the conversations of the employees and for the use to which the monitored conversations were put.

The action of the district court in dismissing the complaint for failure to state a claim on which relief can be granted is affirmed.

APPENDIX C

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of September one thousand nine hundred and sixty-seven.

Present:

HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
Circuit Judges,

HON. JOHN F. DOOLING, JR.,
District Judge.

UNIFORMED SANITATION MEN ASSOCIATION, INC., LEONARD MONTELEONE, AUGUST MASCIA, JOSEPH MIRANDA, NUNZIO CHIERICO, BERNARD F. BELLETTIERE, NICHOLAS J. CARUSO, ANSELMO QUINONES, ANTHONY CALABRESE, JAMES D. MINTER, MARCUS F. KING, JOSEPH BARBARA, PETER I. LOMBARDO, PHILIP D'AGOSTINO, ANTHONY D'AMBROSIO, JOHN L. ALESSIO and MICHAEL A. MANGO,

Plaintiffs-Appellants,

v.

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, COMMISSIONER OF INVESTIGATION OF THE CITY OF NEW YORK, and the CITY OF NEW YORK,

Defendants-Appellees.

Appendix C—Judgment

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO
Clerk

APPENDIX D

Opinion and Order of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

LEONARD B. BOUDIN (Victor Rabinowitz, of counsel, Rabinowitz & Boudin, Morris Weissberg, and John J. DeLury, New York, New York, on the brief), *for Plaintiffs.*

JOHN J. LOFLIN (Frederick S. Nathan and Robert C. Dinerstein, of counsel, J. Lee Rankin, Corporation Counsel of the City of New York, on the brief), *for Defendants.*

CANNELLA, *D.J.*

Plaintiffs' motions, for declaratory judgment pursuant to Rule 57 of the Federal Rules of Civil Procedure and for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, are denied without prejudice. Defendants' motion to dismiss the complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, is granted.

The facts upon which these motions are based are very simple. The individual plaintiffs are City employees working in the Department of Sanitation. While conducting an investigation of irregularities pursuant to Chapter 34 of the Charter of the City of New York, the Commissioner of Investigation obtained authorization in the Supreme Court, New York County, under the provisions of Section 813-a of the New York Code of Criminal Procedure to tap a particular telephone leased by the Department of Sanitation for the transaction of official business.

Subsequently, in November 1966, the Commissioner or his deputy, questioned the plaintiffs concerning their duties and employment. Twelve of them, after being advised that refusal to testify would result in termination of their employment, claimed their constitutional privilege against self incrimination and refused to testify. They were suspended on December 2, 1966 by the Commissioner of Sanitation pursuant to Section 1123 of the Charter of the City of New York.[1] Of the remaining four plaintiffs, one claimed to be incompetent and refused to testify and the other three testified. All four were suspended on December 2, 1966 based on information received from the Commissioner of Investigation concerning irregularities arising out of their employment.

At the present time the twelve employees suspended pursuant to Section 1123 of the Charter of the City of New York are awaiting a hearing to be held on December 27, 1966 at which they may be assisted by counsel and present any defense in their behalf. The remaining four are awaiting the same type of hearing, the date of which has not yet been set.

The plaintiffs have brought this motion to have this court declare Section 813-a of the New York Code of Criminal Procedure and Section 1123 of the Charter of the City of New York, unconstitutional and to enjoin the defendants from using the material acquired by the wiretapping and to order the plaintiffs reinstated in their positions.

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[1] Section 1123 of the Charter of the City of New York provides in pertinent part that "if any . . . employee of the city, after lawful notice or process . . . having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city . . . or official conduct of any officer or employee of the city . . . on the ground that his answer would tend to incriminate him . . . his term or tenure of office or employment shall terminate."

The court finds that it has jurisdiction of these motions. 47 U.S.C. § 605; 42 U.S.C. § 1983; and 28 U.S.C. §§ 1331, 1343, 2201 and 2202.

However, the general rule in the federal courts is that although it has jurisdiction it will abstain from exercising it in a case presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law. *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941). Further, the federal courts exercise the doctrine of absention on grounds of comity with the states when the exercise of jurisdiction by the federal court would disrupt a state administrative process. *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).

The facts before this court present it with a disciplinary action between the City of New York and its employees. At the present moment all of the sixteen employees are suspended and none can be dismissed until after the hearing.[2] *Conlon* v. *Murphy*, 24 A.D. 2d 737; 263 N.Y.S. 2d 360. Thus, this court denies plaintiffs' motions as premature and finds that the Administrative Code of the City of New York[3] and the New York Civil Practice Laws and Rules[4] provide adequate review of administrative decisions.

Further, this court exercises its right of abstention on the ground that plaintiffs' rights will be adequately protected under state remedies.[5] Action by this court at this

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[2] The contention by the plaintiffs that they are automatically dismissed and that the hearings are only *pro forma* hearings is an issue which ought to be decided by a state and not a federal court. *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167 (1959).

[3] See: Administrative Code of the City of New York § 752-6.0(d).

[4] See: CPLR §§ 7801-06; §§ 6301-15; § 3017.

[5] *Daniman* v. *Board of Education*, 306 N.Y. 532, 119 N.E. 2d 373 (1954), rev'd on other grounds, *Slochower* v. *Board of Education*, 350 U.S. 551 (1956); *Roosevelt Raceway* v. *Co. of Nassau*, 18 N.Y. 2d 30 (1966).

time would be an undue interference with the state process. *Burford* v. *Sun Oil Co., supra; Fenster* v. *Leary,* 66 Civ. 1927 (S.D.N.Y. December 7, 1966, Kaufman, C.J., Mansfield and Tenney, D.JJ.).

It should be noted, however, that the court's conclusion that plaintiffs have not met the requirements of 28 U.S.C. § 2201 for a declaratory judgment at this juncture of the administrative proceeding, is in no manner a determination by this court that Section 813-a of the New York Code of Criminal Procedure and Section 1123 of the Charter of the City of New York are constitutional. This court is confident that the state courts of New York are sensitive to and will give careful consideration to the very serious constitutional issues that the plaintiffs have raised herein.

So ordered.

Dated: New York, N. Y.,
December 27, 1966.

JOHN M. CANNELLA,
U. S. D. J.

Supreme Court of the United States

October Term, 1967

No. [redacted] 823

UNIFORMED SANITATION MEN ASSOCIATION, INC., *et al.*,
Petitioners,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1967

No. 283

UNIFORMED SANITATION MEN ASSOCIATION, INC., *et al.*,
Petitioners,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

Petitioners ask this Court to issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, entered on September 20, 1967. That judgment unanimously affirmed a judgment of the United States District Court for the Southern District of New York which dismissed petitioners' complaint for failure to state a claim on which relief can be granted.

Questions Presented

1. May a municipal employee be dismissed for refusing to answer questions concerning the proper performance of his duties on the ground that his answers would tend to incriminate him, or for refusing to sign a waiver of immunity from prosecution when called to testify about his employment by a grand jury, and then failing to explain or justify his action at a hearing where he was given full opportunity to do so?

2. Were petitioners' dismissals rendered unlawful because the City Commissioner of Investigation, pursuant to court order, intercepted and recorded telephone conversations over a telephone leased by the City to which conversations certain of the petitioners were parties, even though no evidence derived from the interceptions was offered against the petitioners in any subsequent proceeding?

The Facts

The material facts are not in dispute Petitioners were formerly employees of the New York City Department of Sanitation assigned to the Marine Transfer Station at 91st Street and the East River in Manhattan. In the fall of 1966 the City Commissioner of Investigation learned that Sanitation Department employees were failing to charge private cartmen proper fees for the use of City facilities at the Marine Transfer Station. Instead, the employees were diverting fees to their own use resulting in a loss of income to the City of hundreds of thousands of dollars (R. 5a, 71a-72a).*

* References designated "R." refer to the Joint Appendix in the Court of Appeals.

In the course of his investigation, the Commissioner obtained authorization from Supreme Court, New York County, under the provisions of Section 813-a of New York Code of Criminal Procedure, to tap a telephone (AT 9-7935) leased by the Department of Sanitation for the transfer of official business at the Marine Transfer Station. This official City telephone was the only line tapped in the investigation (R. 72a).

In November, 1966, the Commissioner or his deputy questioned petitioners concerning their duties and employment (R. 41a-65a). Prior to being questioned they were advised of their right to counsel, their right to remain silent and not be compelled to be a witness against themselves, and that anything they said could be used against them. They were also apprised of the provisions of Section 1123 of the New York City Charter concerning dismissal where a City employee fails to testify concerning the property, government or affairs of the City on the ground that his answer would tend to incriminate him (R. 73a-74a). Twelve of the petitioners refused to answer claiming the constitutional privilege against self-incrimination. Three of the petitioners were interrogated and gave answers without claiming the privilege against self-incrimination (R. 6a).

On December 2, 1966, the Commissioner of Sanitation suspended the petitioners. Those who had refused to testify on the basis that their answers would tend to incriminate them were advised that their suspensions were based on Section 1123 of the City Charter. The others were advised that their suspensions were based on information received from the Commissioner of Investigation concern-

ing irregularities arising out of their employment (R. 7a, 45a, 53a).

On December 14, 1966, petitioners commenced this action for declaratory judgment and injunctive relief. As of that date petitioners had been suspended but not dismissed from their employment. Subsequently, on December 16, 1966, the Commissioner of Sanitation issued formal charges under Section 75 of the New York Civil Service Law against the twelve petitioners who had refused to answer questions put to them by the Commissioner of Investigation or his deputy. At the time of argument before the District Court no hearings had been held on these charges (3a, 56a-70a).

After argument of the case in the District Court but prior to the argument in the Second Circuit Court of Appeals the following relevant events occurred.

Hearings were held on the charges made against the twelve employees who invoked the privilege against self-incrimination in their appearance before the Commissioner of Investigation. The only evidence offered against them was the transcript of proceedings before the Commissioner of Investigation. Petitioners were represented at the disciplinary proceedings by the same counsel who appeared for them in the District Court and on their appeal. No transcripts, recordings or other evidence obtained through a wiretap were offered against petitioners or received in evidence during the disciplinary proceedings.

The three petitioners who did not assert the privilege against self-incrimination when called before the Commis-

sioner of Investigation were later summoned to appear before a grand jury and asked to sign waivers of immunity. Each of them refused to sign a waiver. Subsequently, they were served with amended charges by the Commissioner of Sanitation to the effect that they had violated Section 1123 of the New York City Charter by their refusal to waive immunity before the grand jury.

In the hearings conducted in the Department of Sanitation the charges against those three petitioners related solely to their refusal to waive immunity before the grand jury. No evidence or testimony of any kind based upon a wiretap was offered against them.

At the disciplinary proceedings petitioners offered no testimony to explain their refusal to answer questions put to them by the Commissioner of Investigation or his deputy or their refusal to sign waivers of immunity. Their defense rested solely on claims of unconstitutionality or illegality in the proceedings.

Each of the petitioners was dismissed after the hearings for violations of Section 1123 of the New York City Charter.

Opinions Below

The District Court on respondents' motion dismissed the complaint on grounds of abstention. Subsequent to the District Court decision the New York State Court of Appeals decided *Gardner* v. *Broderick*, 20 N Y 2d 227 (1967), which authoritatively construed Section 1123 of the New York City Charter. The Second Circuit Court of Appeals noted that this construction removed the federal abstention

question from the case and proceeded to consider the merits. In its opinion, the Circuit Court held "there was no invasion of appellants' constitutional rights when they were dismissed from their employment for refusing to answer questions as to their conduct of their jobs." That Court also held that there had been no "trespassory intrusion into private, constitutionally protected premises" as was found to exist by this Court in *Berger* v. *New York,* 388 U. S. 41 (1967). The Circuit Court stated:

> "We also hold that appellants' claim based on the Commissioner's wiretap was properly dismissed. No violation of the Federal Communications Act, 47 USC §605 • • • or deprivation of rights under the Fourth Amendment has been established."

POINT I

As applied in New York, in administrative practice and through judicial interpretation, Charter §1123 meets the constitutional requirements of due process expressed by this Court in *Slochower* v. *Board of Education.*

In *Slochower* v. *Board of Education,* 350 U. S. 551 (1956), this Court was called upon to review a dismissal pursuant to §903 of the New York City Charter (predecessor to the present §1123). Slochower, a Brooklyn College professor, was summarily dismissed pursuant to §903 for failing to answer questions concerning his membership in the Communist Party before a Senate Subcommittee on Internal Security. This Court overruled the holding of the New York Court of Appeals that under §903 an assertion

of the privilege against self-incrimination in defiance of the Charter provision is equivalent to a resignation, saying:

> "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs or government of the city, or * * * official conduct of city employees.' * * *
>
> "The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with the real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law." (at pp. 558-559).

Subsequent to *Slochower* this Court has held that state statutes authorizing the dismissal of public employees who fail to answer questions in an investigation of matters of legitimate concern to the state or agency involved, do not violate due process where a hearing is held prior to dismissal. *Lerner* v. *Casey*, 357 U. S. 468 (1958); *Beilan* v. *Bd. of Ed. of Phila.*, 357 U. S. 399 (1959); *Nelson, et al.* v. *County of Los Angeles*, 362 U. S. 1 (1960). In each of these cases, appellant was dismissed pursuant to the relevant statute, after a hearing before an appropriate administrative body at which time he was given the opportunity to explain his refusal to testify. The ultimate dismissal in each instance was based, not on the mere refusal to testify, but on the breach of a legitimate condition of employment that the refusal reflected.

Since the *Slochower* decision, the New York Courts have made the implied constitutional guarantee of "proper inquiry" an integral part of the disciplinary procedure whenever §1123 is invoked against a public employee. In *Gardner* v. *Murphy,* 46 Misc. 2d 728 (Sup. Ct., N.Y. Co., 1965), the court reviewed this Court's decisions which recognized both the interest of the government in the loyalty of its employees and the need to protect the constitutional rights of those employees, and found:

> "Logic thus dictates the post-*Malloy* v. *Hogan* (378 U. S. 1) applicability to State proceedings of the doctrine enunciated in *Slochower* v. *Board of Educ.* (350 U. S. 551); Automatic dismissal from public employment predicated *solely* upon one's invocation of the Fifth Amendment privilege against self-incrimination is proscribed by the United States Constitution * * *." (46 Misc. 2d at p. 734).
>
> * * *
>
> "If the mere statement of present refusal to waive one's Fifth Amendment rights is interpreted as a prima facie rather than a conclusive basis for discharge, the subject provisions are not repugnant to constitutional mandates as mirrored by the United States Supreme Court pronouncements." (*Ibid.,* at p. 736).

The New York courts consider notice and a hearing in proceedings under §1123 as not merely a *pro forma* requirement, but as a substantive administrative remedy afforded petitioners in this case. This reflects the concern expressed by the Court in *Slochower,* that absent such a hearing:

> "No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege." 350 U. S. at 558.

The recent decision of the New York Court of Appeals in *Gardner* v. *Broderick*, 20 N Y 2d 227 (1967) would appear to have ended any uncertainty as to the New York Court of Appeals' interpretation of §1123.

Petitioner Gardner, a policeman, had, in the course of an investigation of accusations of bribery and corruption of police officers, refused to waive immunity from prosecution and asserted his Fifth Amendment privilege against self-incrimination. He was given an administrative hearing at which time he was afforded an opportunity to explain his silence. Upon refusing to do so, he was dismissed.

In upholding the dismissal, the Court of Appeals cited *Nelson* v. *County of Los Angeles*, 362 U. S. 1 (1960), in sustaining statutes such as §1123 where the plaintiff was not deprived of due process and when the information sought concerned the performance of his duties as a public employee. A challenge to the constitutionality of §1123 after *Gardner* no longer presents a substantial federal question.

Petitioners persist in contending that the City has dismissed them merely for exercising their constitutional right to remain silent. In support of this contention they cite two recent decisions of this Court, *Garrity* v. *New Jersey*, 385 U. S. 493 (1967) and *Spevack* v. *Klein*, 385 U. S. 511 (1967). As to *Garrity*, the Circuit Court below noted that

its "holding has no application to the present case where the employees did not testify, but relied upon their claims of privilege". *Garrity* held only that where testimony was given by public employees under circumstances where failure to testify could lead to dismissal, their testimony could not be used against them in subsequent criminal prosecutions.

As to the effect of the decision in *Spevack*, which involved the disbarment of an attorney, this Court noted that it did not reach the question of the discharge of a public employee who refused to testify in disciplinary proceedings (see fn. 3, 385 U. S. at p. 516). The distinction between *Spevack* and the present case is made clear by Mr. Justice Fortas in his concurring opinion. He stated (385 U. S. at p. 519):

> "I would distinguish between a lawyer's right to remain silent and that of a public employee who is asked questions specifically, directly and narrowly relating to the performance of his official duties as distinguished from his beliefs on other matters that are not within the scope of the specific duties which he undertook faithfully to perform as part of his employment by the State. This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer."

Despite the obvious legitimate interest of the City in the fitness of its employees to perform their duties and the need for employees to cooperate in an official inquiry on this question, petitioners claim the right (1) to refuse to

answer questions concerning their employment put to them by properly authorized City officials or to refuse to sign a waiver of immunity when called to testify before a grand jury, (2) to refuse to offer any explanation or justification for such refusal at a hearing especially called for that purpose, and (3) to retain their City employment. This is not the law.

In its opinion below the Court of Appeals stated (Appendix B to petition, p. 12a):

> "It was surely proper for a city official charged with the duty to do so to investigate charges of misfeasance in the operation of the Sanitation Department and in connection with such an investigation to question employees about their participation in activity which reflected the possibility of bribery and embezzlement. Can there be any reasonable doubt that an employee, especially one who has been warned of the consequences of his refusal to answer, can be (and, indeed, should be) discharged for such refusal?"

A City employee has the right to refuse to answer when questioned about his employment by appropriate City officials but he does not have a right to fail to explain or justify his refusal at a hearing called to afford him that opportunity and at the same time retain his job. Petitioners were lawfully dismissed.

POINT II

The Commissioner of Investigation did not intrude into a constitutionally protected area in placing a wiretap on a City telephone.

Petitioners contend that the wiretap used by the Commissioner of Investigation violated their rights under §605 of the Federal Communications Act and under the Fourth and Fourteenth Amendments.

The question of whether the Commissioner violated §605 does not present a justiciable issue since neither an affirmative nor a negative answer would be dispositive of any of the issues now before this Court.

Neither the tapped conversations nor any evidence obtained through them was ever used against petitioners in their disciplinary hearing or in any subsequent proceeding. Their dismissals were based on their refusal to answer questions relating to their duties or on their refusal to waive immunity from prosecution when called before the grand jury and not on wiretap evidence.

However, even if the Court were to determine that the tap did violate §605, the introduction of such evidence is permitted in state proceedings under the doctrine of *Schwartz* v. *Texas*, 344 U. S. 199 (1952). This Court has rejected the argument that *Mapp* v. *Ohio*, 367 U. S. 643 (1961), which required the exclusion of evidence obtained in violation of the Fourth Amendment in state as well as federal courts, overruled *Schwartz*, with the result that evidence obtained in violation of §605 should also be ex-

cluded from state proceedings. In *Pugach* v. *Dollinger*, 365 U. S. 458 (1961), this Court reaffirmed the *Schwartz* doctrine, indicating that the federal prohibition against the use of wiretap evidence is not constitutionally required and may be overridden by a state policy permitting the use of such evidence in state courts. Thus, finding a violation of §605 alone does not sustain petitioners' claims.

The dispositive issue is whether respondents violated petitioners' Fourth Amendment rights by the wiretap. This question should be answered in the negative.

It is the constitutional and legislative policy in New York to permit police officials and district attorneys to tap telephone wires, subject to the requirement of a court order authorizing such taps. Constitution Art 1, §12; Code of Criminal Procedure, §813-a. The decision in *Berger* v. *New York*, 388 U. S. 41 (1967) does not set aside this policy. Rather, it describes the constitutional framework in which it can be pursued. As the Court below noted (Appendix B to petition, p. 14a):

> "In our view the recent decision of the Supreme Court in *Berger* v. *New York*, 388 U. S. 41 (1967), has no bearing on the present case. In the *Berger* case 'trespassory intrusions into private, constitutionally protected premises' were claimed. The protection of privacy is not involved in our case where the conversations overheard were carried on in the course of the city's business over a telephone leased by the city for the purpose of such official use.
>
> In *Berger* the Court held that the procedure prescribed by §813-a of the New York Code of Criminal Procedure was constitutionally insufficient, under the

circumstances there presented, to justify the use in criminal proceedings of the evidence secured by eavesdropping."

Assuming that the requirements of the Fourth Amendment apply to some tapped conversations, it is difficult to imagine that a telephone leased by the City, on City-owned premises, tapped by a City official in the course of his investigative duties, is a constitutionally protected area, within the purview of the Fourth Amendment protection as defined by *Berger*.

Under circumstances analogous to the instant case, the Court of Appeals for the Second Circuit, in *United States* v. *Collins*, 349 F. 2d 863, cert. den., 383 U. S. 960 (1965), declined to find an invasion of privacy. It sustained the conviction of a federal employee for mail theft where the primary evidence was obtained by a search of defendant's office desk and jacket. In holding this to be a reasonable search and seizure, the court said (349 F. 2d at pp. 867-868):

"We have no doubt that the search of defendant's work area, including the surface and interior of his desk, conducted by Customs agent McDonnell and Post Office Inspector Forster was a constitutional exercise of the power of the Government as defendant's employer, to supervise and investigate the performance of his duties as a customs employee. Defendant was handling valuable mail for which the Government was responsible. The agents were not investigating a crime unconnected with the performance of defendant's duties as a Customs employee."

The parallel between the logic of this case and the present situation is compelling.

It seems reasonable to ask what constitutional prohibition bars the City from its efforts to determine whether or not its own telephone at one of its established places of business is used during regular business hours by City employees to defraud their employer in connection with their assigned duties at that same location? Equipment of many kinds is placed in the hands of City employees to use in the course of their duties. Some of this equipment in corrupt hands can be converted to improper use. But one rule prevails—this is City equipment to be devoted exclusively to City business. The Commissioner of Investigation has the duty, among others, of investigating the misuse of City property. Petitioners cannot show any legal basis for a claim of immunity from investigation. There is no constitutional right to defraud the City by the use of its own telephone.

The City of course did not invade petitioners' homes or delve into their non-public activities. The investigation was limited to the scope of their activities in connection with their own duties at the Marine Transfer Station operated by the Department of Sanitation. The Fourth Amendment has not been and should not be construed to prevent the City from maintaining adequate supervision and control over its employees and equipment under the circumstances presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, N. Y.,
December 13, 1967.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1967

No. 823

UNIFORMED SANITATION MEN ASSOCIATION, INC., *et al.*,

Petitioners,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF

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January 8, 1968.

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PETITIONERS' REPLY BRIEF

Even as phrased in respondents' brief, the questions presented herein are important ones, never squarely decided by this Court although foreshadowed by the decisions upon which petitioners rely. Respondents, however, have interpolated into each question an element not fairly in this case. In fact, (1) petitioners were dismissed for asserting their constitutional privilege against self-incrimination, not their failing to explain or justify its invocation; and (2) the issue is not whether wiretap evidence was offered against petitioners in their disciplinary proceedings, but whether it led to their investigation, suspension and dismissal.

I

Petitioners were dismissed for asserting their constitutional privilege, not for failing to explain its invocation.

The respondents, unlike the court below, argue that the petitioners were dismissed, not for assertion of the privilege, but for failure to explain it. This, however, is not what the New York City Charter contemplated, nor what the complaint alleged, nor what actually occurred. The Charter speaks in unequivocal terms, and makes assertion of the privilege or the refusal to waive immunity an absolute ground for dismissal.

The respondents rely (Br. p. 8) upon the lower court decision in *Gardner* v. *Murphy*, 46 Misc. 2d 728 (Sup. Ct., N.Y. Co. 1965) for the proposition that dismissal from public employment based solely upon the invocation of the privilege is forbidden by the Constitution but that the assertion of the privilege may legitimately serve as a "prima facie" basis for dismissal. This is plainly in conflict with what the Court has said about the privilege in *Ullman* v. *United States*, 350 U.S. 422 and *Slochower* v. *Board of Education*, 350 U.S. 551.

The respondents also assert that since a hearing, purportedly under Section 1123 of the Charter, was held petitioners have been afforded a substantive administrative remedy and that at such a hearing, petitioners had "the right to refuse to answer" but not the "right to fail to explain or justify [their] refusal." (Br. p. 11). However, respondents do not answer the question of how, at such a hearing, one can explain the invocation of the constitutional privilege without surrendering it. As the Court stated in *Hoffman* v. *United States*, 341 U.S. 479, 486-487:

> "if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

Clearly, petitioners were not required to justify their invocation of the privilege at such a hearing.

In any event, respondents' argument ignores the fact, which the court below recognized, that the petitioners "were dismissed from their employment for refusing to answer

questions" (Pet. 12a), not for refusing to justify the invocation of their privilege.

Respondents' casual reference to the inquiry "by appropriate City officials" (Br. p. 11) skims over the fact that it was not an employer's inquiry with respect to the fulfillment of an employee's duties that is involved here, but an inquiry by a criminal investigating agency which, as such, had secured a search warrant to wiretap under Section 813-a of the New York Code of Criminal Procedure, and had formally warned the employees of their constitutional privilege, their right to counsel, etc. (R. 7a-8a). Certainly, no one would suggest that the grand jury's inquiry in which the refusal to waive immunity by three of the petitioners led to their discharge was an inquiry by an employer into qualifications for employment.

The respondents suggest that this Court in *Spevack* v. *Klein*, 385 U.S. 511, "did not reach" the question presented in this petition for certiorari. They cite Mr. Justice Fortas' concurring opinion to emphasize their point (Br. p. 10).[1] The very fact that this Court was not required to reach this important question in that case is a reason for deciding it in the instant one where the issue is squarely presented.[2]

Respondents rely here (Br. p. 7) upon three cases in which a closely divided Court upheld the dismissal of public employees who failed to answer questions put by their employers. None of these cases involved a statutory mandate that assertion of the constitutional privilege

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[1] In *Stevens* v. *Marks*, 383 U.S. 234, the Court had earlier recognized, at p. 243, that the issue was an open one, still to be resolved.

[2] The Corporation Counsel has elsewhere recognized that "all five of the Supreme Court Justices in the majority in those two cases [*Garrity* v. *New Jersey*, 385 U.S. 493 and *Spevack* v. *Klein*, 385 U.S. 511] have left open the question which petitioner argues has been decided in his favor." Brief of the Corporation Counsel in *Gardner* v. *Broderick*, 20 N.Y. 2d 227.

against self-incrimination requires automatic dismissal from employment.[3]

Lerner v. *Casey*, 357 U.S. 468, upheld a statutory mandate that persons "of doubtful trust and reliability" be dismissed from a so-called security agency. The Court held that the refusal to answer certain questions justified "a finding of doubtful trust and reliability". The Court specifically pointed out, however, at p. 477, that the employee's discharge "was not based on the fact that the employee had asserted Fifth Amendment rights". In addition, the Court noted, at p. 478, that "the federal privilege against self-incrimination was not available to appellant through the Fourteenth Amendment" in the state investigation, a statement subsequently overruled by the decision in *Malloy* v. *Hogan*, 378 U.S. 1.

In *Beilan* v. *Board of Education of Philadelphia*, 357 U.S. 399, 400, the Court upheld a school teacher's dismissal for "incompetency" where the "incompetency" was evidenced by the teacher's refusal "to confirm or refute information as to the teacher's loyalty and his activities in certain allegedly subversive organizations".

These cases do not uphold the validity of a statute requiring the automatic dismissal of a public employee who asserts his constitutional privilege against self-incrimination.

II

Petitioners' dismissal from employment resulted from wiretapping which was illegal and in violation of petitioners' constitutional rights.

Respondents first argue that "no evidence derived from the interceptions was offered against the petitioners in any subsequent proceedings" (Br. p. 2). This careful formulation overlooks the result reached in the second *Nardone*

[3] One of those cases, *Nelson* v. *County of Los Angeles*, 362 U.S. 1, was discussed on page 9 of the petition for certiorari in this case.

case, namely, that use of the fruits of illegal wiretapping is prohibited by Section 605 of the Federal Communications Act, *Nardone* v. *United States,* 308 U.S. 338. In the instant case, the complaint alleges that respondents' investigation and disciplinary actions against petitioners were the result of such wiretapping (R. 7a). The affidavits show that the wiretapping was the foundation stone of the interrogation (R. 18a, 72a).

Constitutional questions aside, violation of a federal statute—particularly where it constitutes a crime—does make the dismissal unlawful. The refusal of this Court in *Schwartz* v. *Texas,* 344 U.S. 199, to reverse a state criminal conviction based upon wiretapping was the result of a belief that Congress in enacting Section 605 did not intend to impose a rule of evidence upon state courts. In *Benanti* v. *United States,* 355 U.S. 96, 101, the Court reiterated this view, stating: "[D]ue regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect." In *Stefanelli* v. *Minard,* 342 U.S. 117, 120, the Court had elaborated further on this theme when, in a federal suit to enjoin the use in a state criminal trial of evidence alleged to have been secured by an unlawful state search, it said:

> "Here the considerations governing that discretion touch perhaps the most sensitive source of friction between States and Nations, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the states."

The policy considerations precluding federal interference with state criminal prosecutions do not apply to dismissals from city employment based upon violations of federal law.

Respondents' argument that wiretapping is supported by New York's "constitutional and legislative policy"

(Br. p. 13) ignores the issue of the violation of petitioner's rights under the United States Constitution. It must be reemphasized that in *Berger* v. *New York,* 388 U.S. 41, this Court struck down New York's statute implementing that policy. The court below was wrong—as are respondents—in suggesting that *Berger* was limited to "the circumstances there presented" (Pet. 14a).

Respondents next argue (Br. p. 14) that a "telephone leased by the City, on City-owned premises, tapped by a City official in the course of his investigative duties" is not a "constitutionally protected area, within the purview of the Fourth Amendment protection". Whatever doubts there may have been as to what constitutes a "constitutionally protected area" have been laid to rest by this Court's recent opinion in *Katz* v. *United States,* — U.S. —, 36 U.S.L. Week 4080 (Dec. 19, 1967). There, in reversing a defendant's conviction based upon evidence secured by the use of a listening device attached to the outside of a telephone booth from which the defendant was making a call, the Court departed from the narrow view of the Fourth Amendment which governed the decisions in such cases as *Olmstead* v. *United States,* 277 U.S. 438, and *Silverman* v. *United States,* 365 U.S. 505. The Court declared, at 36 U.S.L. Week 4081:

> "For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of a Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

United States v. *Collins,* 349 F.2d 863 (2d Cir. 1965), *cert. denied,* 383 U.S. 960, is not to the contrary. There, the search was limited to specific and identifiable objects, namely, the defendant's office desk and jacket. This is quite different from wiretapping a telephone where the

wiretap is not limited to conversations relating to city business and there is a "roving commission" to search out all telephone conversations;[4] see *Berger* v. *New York*, *supra*, at 59.

The suggestion (Br. p. 15) that the Commissioner of Investigation was investigating the "misuse of City property" is not a fair description of what occurred here. The Commissioner of Investigation was not interested in the misuse of a telephone, but in securing evidence of crime from the telephone conversations.

III

This case presents two questions of continuing importance which require early resolution by the Court. One question, that of the privilege against self-incrimination, is reflected by the pending jurisdictional statement in *Gardner* v. *Broderick*, October Term, 1967, No. 635. The second question is whether wiretapping, engaged in by city officials in violation of a federal statute and the Fourteenth Amendment, can lawfully lead to the dismissal of an employee from public employment.

The instant petition has the advantage of presenting both issues to this Court upon a very short record involving no disputed issues of fact. Counsel is prepared to brief and argue the case upon short notice. In the light of the fact that it presents two separate and important questions of constitutional law, it is respectfully suggested that full argument be permitted in this case even if jurisdiction is noted in *Gardner* or other cases of a similar nature.

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[4] Respondents have not complied with petitioners' requests for copies of the application for the wiretap order and the order itself.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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January 8, 1968.

Supreme Court of the United States

October Term, 1967

No. 823

UNIFORMED SANITATION MEN ASSOCIATION, INC., *et al.*,

Petitioners,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the Court of Appeals (R. 79a-89a)[1] is reported at 383 F. 2d 364. The opinion of the District Court (R. 75a-78a) is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on September 20, 1967 (R. 90a-91a). The petition for a writ of certiorari was granted on January 29, 1968 (R. 91a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

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[1] "R" refers to the Joint Appendix filed in this Court.

Questions Presented

1. Were the dismissals from public employment of the individual petitioners, pursuant to Section 1123 of the New York City Charter, in violation of their privilege against self-incrimination, their right to due process and their immunities and privileges under the Fourteenth Amendment?

2. Were the dismissals from public employment, resulting from wiretapping of the employees' telephone conversations without the participants' consent, unlawful because the wiretapping violated the Federal Communications Act of 1934, 47 U.S.C. § 605, the employees' constitutional right to privacy and the prohibition of the Fourth and Fourteenth Amendments against unlawful search and seizure?

Statutes Involved

The state statutes are Section 1123 of the New York City Charter, Appendix, *infra*, p. 26, and Section 813-a of the New York Code of Criminal Procedure, Appendix, *infra*, p. 26.

The federal statute is the Federal Communications Act of 1934, 47 U.S.C. §§ 501, 605, Appendix, *infra*, pp. 27-28.

Statement

Uniformed Sanitation Men Association, Inc. (herein called the "Union") is a labor union, the collective bargaining agent for approximately 10,000 sanitationmen employed by the Department of Sanitation, and a party to a collective bargaining agreement with the City of New York on behalf of those employees (R. 4a). The other petitioners (herein called the "petitioners") are employees of the Department of Sanitation with long tenure and un-

blemished departmental and military records; most of them are members of and represented by the Union (R. 5a).

In November, 1966, the Commissioner of Investigation of the City of New York conducted an investigation of employees of the Department of Sanitation in the course of which he placed a wiretap upon the telephone at their place of employment pursuant to an order of a Justice of the New York Supreme Court under Section 813-a of the Code of Criminal Procedure (R. 72a-81a) and intercepted, recorded and divulged their conversations (R. 7a, 18a).

In the same month the Commissioner directed each of the individual petitioners to appear before him in separate hearings conducted under oath and stenographically recorded (R. 57a). He charged them with criminal behavior (R. 42a), and informed them that he had recordings of their telephone conversations, some of which he played back to them (R. 7a, 61). The Commissioner also informed the petitioners that they were entitled to assert their constitutional privilege against self-incrimination, but that if they did so, they would be dismissed from employment pursuant to Section 1123 of the New York City Charter. He said:

> "You are further advised that if you do refuse to testify or to answer any question regarding the affairs of the City or regarding your official conduct or the conduct of any other officer or employee of the City on the ground that your answer would tend to incriminate you, your term or tenure of office or employment shall terminate and you shall not be eligible to election or appointment to any office or employment under the City or any agency, in accordance with the provisions of Section 1123 of the New York City Charter." (R. 74a).

Twelve of the petitioners asserted their privilege against self-incrimination (R. 6a). Thereupon, the Com-

missioner of Sanitation, their employer, suspended them for invoking the privilege, and served them with charges to that effect (R. 45a). The Court of Appeals (herein called the court below) correctly concluded that "[t]he twelve who had invoked the privilege against self-incrimination were advised that their suspensions were based on their refusals to testify as provided by Section 1123 of the City Charter" (R. 83a-84a). Subsequently, as the Court of Appeals said, "[t]he twelve appellants who had invoked the privilege against self-incrimination were dismissed from their positions" (R. 85a) after departmental hearings. "The evidence on which the dismissals were based", said the court, "consisted of the transcripts of the proceedings before the Commissioner of Investigation in which the appellants had asserted the privilege. Section 1123 of the City Charter was cited as the legal basis for the dismissals" (R. 85a-86a).

Three other petitioners who answered the Commissioner of Investigation's questions and denied their guilt were suspended on December 2, 1966 by the Commissioner of Sanitation by reason of "information received from the Commissioner of Investigation concerning irregularities arising out of your employment in the Department of Sanitation" (R. 84a). These petitioners were summoned before a grand jury and asked to sign waivers of immunity (R. 86a). Upon their refusal, the Department of Sanitation served them with amended charges "alleging that by refusing to waive their immunity they had violated Section 1123" (R. 86a). They, too, were given hearings not on the charges of wrongdoing but on charges limited to the refusal to waive immunity. On February 9, 1967, the Commissioner of Sanitation dismissed them from employment in accordance with Section 1123 of the New York City Charter solely because they had refused to execute waivers of immunity before the grand jury (R. 86a).

The petitioners thereupon sued for a declaratory judgment that the suspensions and discharges were illegal

because Section 1123 of the Charter violated the employees' rights under the Fifth and Fourteenth Amendments to the United States Constitution and because the wiretapping violated the Federal Communications Act of 1934, 47 U.S.C. § 605, and impaired their right to privacy and their right against unlawful search and seizure under the Fourteenth Amendment (R. 9a-10a). They also sought discovery and an injunction against the continuation of such illegal conduct (R. 10a).

The district court denied petitioners' motion for preliminary injunction and for discovery, and granted the respondents' motion to dismiss the complaint, declining to exercise jurisdiction on the basis of the abstention doctrine (R. 75a-78a). It emphasized that its decision "is in no manner a determination by this court that Section 813-a of the New York Code of Criminal Procedure and Section 1123 of the Charter of the City of New York are constitutional" (R. 77a). It added that "[t]his court is confident that the state courts of New York are sensitive to and will give careful consideration to the very serious constitutional issues that the plaintiffs have raised herein" (R. 77a-78a).

The Court of Appeals decided the case upon the merits because of further administrative action taken in the Department of Sanitation after the district court's decision and because an intervening decision of the New York Court of Appeals had "removed any ground there may have been for federal abstention" (R. 86a). It affirmed the dismissal of the complaint holding (i) that petitioners had no constitutional privilege against self-incrimination to refuse "to answer questions as to their conduct in office" (R. 87a), and (ii) that the wiretapping had violated neither the Federal Communications Act, 47 U.S.C. § 605 nor petitioners' constitutional rights (R. 88a).

Summary of Argument

I. The Constitutional Privilege Against Self-Incrimination.

A. The decision below is in direct conflict with the Court's decision in *Slochower* v. *Board of Education*, 350 U.S. 551, which held that the identical City Charter provision violated the due process clause of the Fourteenth Amendment because public employment was automatically terminated upon assertion of the constitutional privilege.

The court below erroneously relied upon the Court's decision in *Nelson* v. *County of Los Angeles*, 362 U.S. 1. That decision is of doubtful validity in the light of the Court's later decisions in *Malloy* v. *Hogan*, 378 U.S. 1, and *Spevack* v. *Klein*, 385 U.S. 511. In any event, it is inapposite since it involved a statute which made no reference to the privilege against self-incrimination. Other cases relied upon by the respondents involve statutes not directed against the privilege and expressly reaffirm *Slochower*.

B. The decision below is also inconsistent with the Court's decision in *Malloy* v. *Hogan*, *supra*, that the "Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the states." *Id.* at 6.

This principle has been applied by the Court in two different situations; first, to invalidate criminal convictions of public employees based upon evidence obtained from them under a state statute compelling them to make such statements or be discharged from employment, *Garrity* v. *State of New Jersey*, 385 U.S. 493; second, to invalidate the disbarment of a lawyer for invoking his constitutional privilege in refusing to answer questions in disciplinary proceedings, *Spevack* v. *Klein*, *supra*.

C. It is not necessary to determine in this case the broad question of a public employee's duty generally to

answer his employer's questions. The petitioners were dismissed, as required by the New York City Charter, because they asserted their constitutional privilege in the course of a criminal investigation initiated and conducted by the Commissioner of Investigation. He secured a wiretap order pursuant to a New York criminal law (subsequently held unconstitutional by the Court in *Berger* v. *New York*, 388 U.S. 41), and conducted a formal hearing under oath and stenographically recorded. He charged the petitioners with crime and turned over his "evidence" to the District Attorney who subpoenaed some of the petitioners to appear before a grand jury.

D. The Court of Appeals was in error, in view of the mandatory language of the Charter, in deciding the issue of an employee's duty to answer questions.

The imposition of such a duty by the court below imposed a penalty upon assertion of the privilege. It ignored the Court's liberal construction of the privilege. It rejected the accusatorial system of justice written into modern civil service law. These views are reflected in the plurality opinion of the Court in *Spevack* v. *Klein, supra,* which was not discussed or even cited by the court below. The earlier decision relied upon by it, *Nelson* v. *County of Los Angeles, supra,* was, we believe, incorrectly decided. Therefore, if the issue is reached, the Court should adopt the dissenting opinions in that case.

II. The Unlawful Wiretapping.

A. The wiretapping violated the clear mandate of the Federal Communications Act of 1934, 47 U.S.C. § 605, that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person." The statute has received a broad construction from the Court

in view of the importance of its congressional objective. See *Nardone* v. *United States,* 302 U.S. 379, 308 U.S. 338. Petitioners' dismissals after an investigation initiated by wiretapping were therefore the "fruits of the poisonous tree". *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392; see *Nardone* v. *United States,* 308 U.S. 338.

B. The wiretapping was an unreasonable search and seizure and a violation of the right of privacy of the employees under the Fourth and Fourteenth Amendments. It constituted an "unjustifiable intrusion by the Government upon the privacy of the individual" (Mr. Justice Brandeis dissenting in *Olmstead* v. *United States,* 277 U.S. 438, 478). It also violated the standards of due process required of the states under the Fourteenth Amendment. Finally, the wiretapping was made pursuant to an order of a New York State Supreme Court Justice under Section 813-a of the New York Code of Criminal Procedure which the Court held unconstitutional in *Berger* v. *United States, supra.*

The Court of Appeals was in error in ruling that the petitioners had no rights under the statute and Constitution because the wiretapped telephone was leased by the City. The statute makes no exception based upon property rights, and the Court has held that "the principal object of the Fourth Amendment is the protection of privacy, rather than property." *Warden, Maryland Penitentiary* v. *Hayden,* 387 U.S. 294, 304. That principle was recently applied to invalidate a conviction based upon a listening device outside a telephone booth. *Katz* v. *United States,* 389 U.S. 347.

C. Increasing governmental surveillance of public employees and private citizens has led to widescale invasions of privacy. The wiretapping engaged in here must be condemned if that privacy is to be protected.

ARGUMENT

I.

The decision below, in disregard of the decision in *Slochower* v. *Board of Education*, 350 U.S. 551, upholds the automatic termination of public employment upon invocation of the privilege against self-incrimination.

A. The identical Charter language was held in *Slochower* to deny due process because assertion of the privilege automatically terminated employment.

The decision below is squarely in conflict with the Court's decision in *Slochower* v. *Board of Education, supra,* which held that Section 903 of the New York City Charter, as interpreted and applied by the New York courts, violated the due process clause of the Fourteenth Amendment. That section (identical in language with the present Section 1123) provided that when any city employee refused to testify concerning city affairs "on the ground that his answer woud tend to incriminate him, or shall refuse to waive immunity from prosecution . . . his term or tenure of office or employment shall terminate."

The New York Court of Appeals in *Daniman* v. *Board of Education of the City of New York,* 306 N.Y. 532, 119 N.E. 2d 373 (1954), *appeal dismissed,* 348 U.S. 993, had construed Section 903 to provide for the automatic dismissal of City employees who assert their privilege against self-incrimination:

> "The assertion of the privilege against self-incrimination is equivalent to a resignation.
>
> • • •
>
> There is nothing novel about such a statute. Other statutes provide for the vacatur of, or forfeiture of, an office or employment upon the happening of an event specified therein." 306 N.Y. at 538-539.

In *Slochower* v. *Board of Education, supra,* the constitutionality of Section 903 was considered by the Court as to Dr. Slochower since he alone of the plaintiffs in the *Daniman* group of cases had properly raised the federal issues in the state courts. The Court reversed the New York Court of Appeals, holding that the dismissal of Dr. Slochower for assertion of the privilege was a denial of due process under the Fourteenth Amendment. The Court condemned "the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment." *Id.* at 557. It stated:

> "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Id.* at 557-8.
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> * * *
>
> "With this in mind, we consider the application of § 903. As interpreted and applied by the state courts, it operates to discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge. No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive. Such action falls squarely within the prohibition of *Wieman* v. *Updegraff, supra.*" *Id.* at 558.

In short, the Court in *Slochower* held Section 903 of the Charter unconstitutional on the ground that the statute, as interpreted by the New York Court of Appeals, violated due process by requiring the automatic discharge from employment of every city employee who invoked the Fifth Amendment.

Despite the Court's direct holding in *Slochower* that Section 903 was unconstitutional, Section 1123, identical in language with Section 903, was enacted in November, 1961. This section served as the basis for the warning by the Commissioner of Investigation that if any employee asserted his constitutional privilege, he would be dismissed from his employment (R. 75a). Indeed twelve employees were dismissed for asserting their constitutional privilege (R. 85a), while the remaining three were dismissed for refusing to waive immunity before a grand jury (R. 86a).[2]

The Court of Appeals, in spite of the controlling effect of *Slochower*, did not even mention that decision. Instead, it based its decision upon *Nelson* v. *County of Los Angeles*, *supra* (R. 87a). That case does not support the decision below since *Nelson* involved a dismissal from employment pursuant to a statute which "made no reference to Fifth Amendment privileges", *id.* at 7. The Court in *Nelson* did not overrule *Slochower*; it reaffirmed and distinguished it on the ground that "the New York statute under which Slochower was discharged specifically operated 'to discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge.' . . ." *Ibid.* The Court upheld petitioners' present analysis of the New York City Charter by stating:

> "This 'built-in" inference of guilt, derived solely from a Fifth Amendment claim, we held to be arbitrary and unreasonable. But the test here, rather than being the invocation of any constitutional privilege, is the failure of the employee to answer. California has not predicated discharge on any 'built-in' inference of guilt in its statute, but solely on employee insubordination for failure to give information which we have held that the State has a legitimate interest in securing." *Ibid.*

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[2] The case of the remaining employee, John Alessio, is moot (R. 83a, n. 6).

In view of the controlling effect of *Slochower*, the court below was quite correct in not deeming applicable the decisions in *Lerner* v. *Casey*, 357 U.S. 468, and *Beilan* v. *Board of Education of Philadelphia*, 357 U.S. 399, which the respondents had urged upon it. But since the respondents relied upon those cases in their opposition to the petition for certiorari in this case,[3] it is appropriate to indicate again the distinction between the *Lerner-Beilan* type of case and the present one. Whatever may be the viability today of those closely divided decisions, particularly in the light of *Malloy* v. *Hogan, supra*, they are distinguishable because neither involved the validity of a statute requiring the automatic dismissal of a public employee who asserted his constitutional privilege against self-incrimination.

Lerner v. *Casey, supra*, upheld a statutory mandate that persons "of doubtful trust and reliability" be dismissed from a so-called security agency. The Court held that the refusal to answer certain questions justified "a finding of doubtful trust and reliability." *Id.* at 476. The Court specifically pointed out, however, at p. 477, that the employee's discharge "was not based on the fact that the employee had asserted Fifth Amendment rights." In addition, the Court noted, at p. 478, that "the federal privilege against self-incrimination was not available to appellant through the Fourteenth Amendment in the state investigation," a view subsequently overruled by the decision in *Malloy* v. *Hogan, supra*.

In *Beilan* v. *Board of Education of Philadelphia, supra*, the Court upheld a school teacher's dismissal for "incompetency" where the "incompetency" was evidenced by the teacher's refusal "to confirm or refute information as to the teacher's loyalty and his activities in certain allegedly subversive organizations." *Id.* at 400. Again there was no statute declaring an office vacant upon invocation of the privilege against self-incrimination.

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[3] Brief in opposition to petition for certiorari, p. 7.

B. The Charter violates the privilege against self-incrimination.

The decision below is inconsistent with a line of decisions in the Court subsequent to *Slochower* holding that the Fourteenth Amendment prohibits not only arbitrary and summary dismissal from public employment but also compulsory self-incrimination by the states. In *Malloy* v. *Hogan, supra,* the Court held that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States." 378 U.S. 1, 6. This principle has been repeatedly applied by the Court in subsequent decisions, *Murphy* v. *Waterfront Commission of New York Harbor,* 378 U.S. 52; *Stevens* v. *Marks,* 383 U.S. 234; *Spevack* v. *Klein, supra;* and *Garrity* v. *State of New Jersey, supra.*

In *Garrity, supra,* the Court held it to be a violation of the Fourteenth Amendment to admit into evidence in a criminal proceeding the statements of police officers obtained from them under a state statute that compelled them to make such statements or be discharged from employment. The Court said:

> "The choice given appellants was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." *Garrity* v. *New Jersey, supra,* at 497.

In citing and distinguishing the celebrated statement of Mr. Justice Holmes in *McAuliffe* v. *New Bedford,* 155 Mass. 216, 29 N.E. 517 (1892), that one "has no constitutional right to be a policeman," the Court said:

> "Our question is whether the Government, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee."

* * *

> "We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity* v. *New Jersey, supra,* at 499-500.

In *Spevack* v. *Klein, supra,* the Court upheld the right of a lawyer to assert his constitutional privilege in disciplinary proceedings. While the Court left open the question of a public employee's right to refuse to answer questions in a general investigation of his conduct, regardless of the ground of the refusal, *id.* at 516, none of the Justices of the Court questioned the *Slochower* decision; implicit also was the recognition that under *Malloy* v. *Hogan, supra,* and *Griffin* v. *California,* 380 U.S. 609, a statute of the kind here involved violated the privilege against self-incrimination.

The court below sought to distinguish only *Garrity* v. *New Jersey, supra,* by stating that its "holding has no application to the present case where the employees did not testify, but relied upon their claims of privilege" (R. 87a). While it is true that *Garrity* involved the use in a criminal proceeding of "testimony which was coerced by threat of loss of employment" (R. 87a), the principle upon which it stands is undermined by the decision of the court below. If the fruits of an illegal coercion cannot be used in a criminal proceeding, *cf. Silverthorne Lumber Co.* v. *United States, supra,* surely the employee cannot be dismissed for refusing to yield to such coercion. In one case the employee yields to the coercion and perhaps incriminates himself, and in the other case he does not yield and is dismissed from employment.

In both cases the state's action is offensive to the liberal construction which the Court has given to the privilege against self-incrimination in a variety of contexts. *Quinn* v. *United States,* 349 U.S. 155; *Emspak* v. *United States,* 349 U.S. 190; see *Ullman* v. *United States,* 350 U.S. 422; *Marchetti* v. *United States,* — U.S. —, 36 U.S.L. Week 4143 (January 30, 1968). Both types of state

sanctions are forbidden by the Court's holding in *Malloy* v. *Hogan, supra,* that "the Fourteenth Amendment secures against state invasion . . . the right of a person to remain silent and to suffer no penalty . . . for such silence." 378 U.S. at 8.

C. This case, involving a criminal investigation, does not involve the duty of the public employee to answer his employer's questions concerning the performance of duty.

This case does not present the question left open in *Stevens* v. *Marks, supra,* and *Spevack* v. *Klein, supra,* at 516, as to "[w]hether a policeman, who invokes the privilege when his conduct as a police officer is questioned . . . may be discharged for refusing to testify." That question need not be resolved here because the employees were suspended and dismissed in the course of criminal investigations for refusing to surrender their privilege or to waive immunity against criminal prosecution.

That these were criminal investigations is obvious from the nature of the proceedings, the status of those in charge and the techniques used by them. The Commissioner of Investigation wiretapped the employees' telephone conversations pursuant to a statute requiring "reasonable ground and belief that evidence of crime may be thus obtained." New York Code of Criminal Procedure § 813-a (R. 81a). Conducting the hearing in the absence of the employees' Sanitation Department supervisors, he advised the employees of their constitutional privilege against self-incrimination, charged them with crime (R. 82a) and turned over his evidence to the District Attorney. The latter then subpoenaed three of the employees to appear before a grand jury where he requested them to waive immunity against prosecution and declined to interrogate them when they refused to execute such waivers (R. 11a).

This was certainly not a disciplinary proceeding conducted by an employer. Sanitation officials were not

present in the hearings conducted by the Commissioner of Investigation nor, of course, before the grand jury (R. 18a). An inquiry into fitness would have included a reasoned evaluation of the employees' job performance, of the charges and evidence against them and of their refusal to answer particular questions. Instead, here, we have an automatic dismissal from employment required by a City Charter provision which the Court had declared unconstitutional twelve years earlier.

D. Even absent a statute specifically directed against the privilege, a public employee may not be discharged for relying upon the privilege in an investigation of his conduct.

The Court's decision in *Slochower* striking down the identical Charter provision as unconstitutional, as well as the nature of the criminal investigation in this case, makes it unnecessary to reach the broader issue of whether, in the absence of a statute specifically penalizing invocation of the privilege, a public employee's invocation of the privilege bars his dismissal from employment.

However, the Court of Appeals disregarded the clear language of the Charter provision, refused to follow the Court's decision in *Slochower* and addressed itself to the broader problem (R. 87a). Accordingly, comment on the point is appropriate. The court below offered no explanation for its conclusion and rested, instead, upon the rhetorical question, "Can there be any reasonable doubt that an employee, especially one who has been warned of the consequences of his refusal to answer can be (and, indeed, should be) discharged for such refusal?" (R. 87a).

We believe that the lower court's answer is objectionable in principle, from three points of view. (1) It imposes a penalty upon assertion of the privilege despite the Court's decision in *Malloy* v. *Hogan, supra;* the loss of employment in this context is such a penalty, *Spevack* v. *Klein, supra,*

at 516. (2) It seeks to reverse the Court's liberal construction of the privilege. (3) It rejects an accusatorial system of justice written into the modern civil service law under which the public employer must prove its case, through adverse witnesses, not through the compelled testimony of the employee under investigation.

These views were reflected in the plurality opinion of the Court in *Spevack* v. *Klein, supra,* which is not cited by the Court of Appeals, and in the dissenting opinion in *Nelson* v. *County of Los Angeles, supra.*

In *Spevack* v. *Klein, supra,* the Court held that the disbarment of an attorney for refusing, on grounds of self-incrimination, to testify and produce records in a state judicial inquiry into unethical practices violated his constitutional guarantee against self-incrimination under the Fourteenth Amendment. The Court said that the "self-incrimination clause of the Fifth Amendment [which] has been absorbed by the Fourteenth . . . should not be watered down by imposing . . . the loss of livelihood as a price for asserting it," *id.* at 514.

Overruling its earlier decision in *Cohen* v. *Hurly,* 366 U.S. 117, the Court said:

> "We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others. Lawyers are not excepted from the words 'No person . . . shall be compelled in any criminal case to be a witness against himself'; and we can imply no exception. Like the school teacher in *Slochower* v. *Board of Education, supra,* and the policeman in *Garrity* v. *New Jersey, supra,* lawyers also enjoy first-class citizenship." *Spevack* v. *Klein, supra,* at 516.

The Court left open the question of whether "a policeman who invokes the privilege when his conduct as a police officer is questioned . . . may be discharged for refusing to testify," *Spevack* v. *Klein, supra,* at 516, although Mr.

Justice Fortas indicated that, subject to constitutional limitations, his answer would be in the affirmative. *Id.* at 520.

Nelson v. *Los Angeles County, supra,* did not involve a statute specifically directed, as here, at the privilege. Despite that fact, Justices Black and Douglas regarded the state's action as a violation of the privilege against self-incrimination and due process. Mr. Justice Black stated:

> "The basic purpose of the Bill of Rights was to protect individual liberty against governmental procedures that the Framers thought should not be used. That great purpose can be completely frustrated by holdings like this. I would hold that no State can put any kind of penalty on any person for claiming a privilege authorized by the Federal Constitution. The Court's holding to the contrary here does not bode well for individual liberty in America." 362 U.S. at 10.

It was the opinion of Mr. Justice Brennan that the case was "governed squarely by *Slochower*", *id.* at 11, despite the fact that "[t]he Court appears to treat the fact that the California statute is not in terms directed at the exercise of the privilege against self-incrimination, but rather covers all refusals to answer, as a factor militating in favor of its validity," *id.* at 11, n. 1.

These dissenting views, we believe, are reflected in the plurality opinion in *Spevack* v. *Klein, supra.* Nor, as indicated above, do we see any reason in principle why the privilege in this context should be limited to lawyers.

II.

Petitioners' dismissals from employment resulted from wiretapping in violation of the Federal Communications Act of 1934 and petitioners' constitutional rights under the Fourth and Fourteenth Amendments.

The investigation, suspension and dismissal of petitioners were the direct result of wiretapping by the respondent Commissioner of Investigation, in violation of the Federal Communications Act of 1934, 47 U.S.C. §§ 501, 605, and of petitioners' constitutional rights under the Fourth and Fourteenth Amendments against unreasonable search and seizure and against invasion of their privacy.

A. The wiretapping violated the Federal Communications Act.

Petitioners and those to whom they allegedly talked on the telephone plainly did not authorize the Commissioner of Investigation to intercept their conversations, to use them as a basis of interrogation or to divulge them to the Commissioner of Sanitation or to the District Attorney. Thus the Commissioner violated the statutory proscription that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purpose, effect, or meaning of such intercepted communications to any person," 47 U.S.C. § 605. This statute has received a broad construction from the Court in view of the congressional objective of protecting the conversations of persons using the telephones. See *Nardone* v. *United States*, 302 U.S. 379, 308 U.S. 338; *Goldstein* v. *United States*, 316 U.S. 114; *United States* v. *Coplon*, 185 F. 2d 629 (2d Cir. 1950), *cert. denied*, 342 U.S. 920.

Violations of Section 605 are made criminal by Section 501 of the Act. The illegal wiretapping engaged in here invalidates the suspensions and dismissals of petitioners since Section 605 prohibits not only illegal wiretapping but also the fruits of illegal wiretapping.

> "To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed inconsistent with ethical standards and destructive of personal liberty." *Nardone* v. *United States,* 308 U.S. 338, 340

In the instant case, the complaint alleges that respondents', investigation and disciplinary actions against petitioners were the result of such wiretapping (R. 7a). The affidavits show that the wiretapping was the foundation stone of the interrogation (R. 18a, 72a).

B. The wiretapping violated petitioners' constitutional rights.

The wiretapping also constituted an unreasonable search and seizure and a violation of petitioners' constitutional rights of privacy under the Fourth and Fourteenth Amendments to the United States Constitution.

In *Olmstead* v. *United States, supra,* Justices Brandeis, Holmes, Stone and Butler, in three separate opinions, dissented from an affirmance of a criminal conviction based upon wiretapping which had occurred prior to the passage of the federal wiretapping law. The dissent of Mr. Justice Brandeis set forth the famous concept of the "right to be left alone":

> "To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed must be deemed a violation of the Fourth Amendment. And the use as evidence in a criminal proceedings of facts ascertained by such intrusion must be deemed a violation of the Fifth." *Id.* at 478-79.

Subsequent to *Olmstead,* the Court, in cases involving the use of evidence secured by wiretapping, based its decisions on the presence or absence of a physical "trespass" into a given area. Thus, in *Goldman* v. *United States,*

316 U.S. 129, the Court upheld a conviction where the evidence was secured by use of a receiver placed against the wall of defendant's office, while in *Silverman* v. *United States,* 365 U.S. 505, the Court reversed a conviction where an electronic listening device touched heating ducts in a house occupied by the defendants. This approach to the meaning of the Fourth Amendment's prohibition against unreasonable search and seizure was discarded by the Court in *Katz* v. *United States, supra.* There, the Court stated:

> "[o]nce it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.
>
> We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decision that the 'trespass' doctrine there enunciated can no longer be regarded as controlling . . . The fact that the electronic device . . . did not happen to penetrate the wall of the booth can have no constitutional significance." *Id.* at 353.

The decision of the court below is in direct conflict with the Court's decision in *Berger* v. *United States, supra,* where the Court declared unconstitutional Section 813-a of the New York Code of Criminal Procedure, the very statute under which the Commissioner of Investigation obtained the wiretapping order in this case. The Court said:

> "We have concluded that the language of New York's statute is too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area and is, therefore, violative of the Fourth and Fourteenth amendments." *Id.* at 44.

After analyzing the procedures set forth under the statute, the Court concluded:

> "New York's broadside authorization rather than being 'carefully circumscribed' so as to pre-

> vent unauthorized invasions of privacy actually permits general searches by electronic devices, the truly offensive character of which was first condemned in *Entick* v. *Carrington*, 19 How. St. Tr. 1029, *supra*, and which were then known as 'general warrants.'" *Id.* at 58.

and

> "In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures." *Id.* at 60.

The concurring opinions of Justices Douglas and Stuart, *id.* at 64 and 68, and the dissenting opinions of Justices Black, Harlan and White, *id.* at 71, 91 and 107, explicitly recognize that the Court was declaring New York's statute unconstitutional on its face.

C. The City's alleged property rights in the telephone are not relevant to its violation of petitioners' statutory and constitutional rights.

The court below was in error in holding that petitioners are without statutory and constitutional rights because the telephone was "leased by the City of New York and assigned to the Department of Sanitation for the conduct of its official business" (R. 88a). Congress made no statutory exception based upon property rights to the telephone service. See *Benanti* v. *United States*, 355 U.S. 96; *Reitmeister* v. *Reitmeister*, 162 F.2d 691 (2d Cir. 1947); *United States* v. *Polakoff*, 112 F.2d 888 (2d Cir. 1940), *cert. denied*, 311 U.S. 653.

In this important respect the decision below is in direct conflict with the prior decision of the Second Circuit in the *Coplon* espionage case where the Government was held to have illegally intercepted the telephone conversations of its own employee in the offices of the Department of Justice, *United States* v. *Coplon*, *supra*.

Second, the determinative issue, for constitutional as well as statutory purposes, is not the ownership of the

telephone, but the privacy of the conversations. The lower court's reasoning is clearly in conflict with the Court's recent statement that "[w]e have recognized that the principal object of the Fourth Amendment is the protection of privacy, rather than property and have increasingly discarded ficitional and procedural barriers rested on property concepts." *Warden Maryland Penitentiary* v. *Hayden, supra*, at 304. See also *Berger* v. *New York, supra; Camara* v. *Municipal Court*, 387 U.S. 523; *See* v. *City of Seattle*, 387 U.S. 541; *Griswold* v. *Connecticut*, 381 U.S. 479.

The respondents' reference to a "constitutionally protected area, within the purview of the Fourth Amendment protection"[4] has been conclusively answered by the Court's recent opinion in *Katz* v. *United States, supra.* There, in reversing a criminal conviction based upon evidence secured by the use of a listening device attached to the outside of a telephone booth from which the defendant was making a call, the Court departed from the narrow view of the Fourth Amendment which governed the decisions in such cases as *Olmstead* v. *United States, supra*, and *Silverman* v. *United States, supra.* The Court declared:

> "For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of a Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-352.

The Court of Appeals was also clearly in error when it held that the search (by wiretapping) was not unreasonable because "[t]he conversations were being conducted in the course of the discharge of appellants' official duties" (R. 88a). There is no analogy to "public records and official

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[4] Brief in opposition to petition for certiorari, p. 14.

documents made or kept in the administration of public office", *ibid.*, quoting from *Wilson* v. *United States*, 221 U.S. 361, since there is an obvious difference between wiretapping a private telephone conversation which might disclose dereliction of the employee's duties and subpoenaing public records belonging to the government.

United States v. *Collins*, 349 F. 2d 863 (2d Cir. 1965), *cert. denied*, 383 U.S. 960, relied upon by the court below (R. 88a-89a) is equally inapposite. There, the search was limited to specific and identifiable objects, namely, the defendant's office desk and jacket. This is quite different from a wiretap which constitutes a "roving commission" to search out all telephone conversations; see *Berger* v. *New York, supra*, at 59.

D. Public employees require protection against illegal governmental surveillance.

The wiretapping of employees' conversations, which would have obviously been illegal had they been privately employed, is a serious violation of their right of privacy requiring judicial protection. The wiretapping is only one aggravated aspect of increasing governmental surveillance of public employees through electronic and other mechanical devices. See *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. (1965); *Hearings on S. 928 Before a Subcommittee of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. (1967).

New techniques have been developed which have greatly aided in this surveillance, techniques which have invaded traditional areas of individual privacy. Effective measures to protect this privacy have not kept pace with the new techniques of surveillance. See *Westin, Privacy and Freedom* (1967). If the privacy of government employees is to have continued meaning in our society it is imperative that the wiretapping engaged in here be recognized as violative of both the statute and the Constitution.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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March 13, 1968

APPENDIX

NEW YORK CITY CHARTER, § 1123: Failure to testify.

If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency.

NEW YORK CODE OF CRIMINAL PROCEDURE, § 813-a: Ex parte order for eavesdropping.

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or

telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same.

FEDERAL COMMUNICATIONS ACT OF 1934, 47 U.S.C., § 501: General Penalty.

Any person who willfully and knowingly does or causes or suffers to be done any act, matter or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than

FEDERAL COMMUNICATIONS ACT OF 1934, 47 U.S.C. § 605: Unauthorized publication or use of communications.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena (sic) issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

Supreme Court of the United States

October Term, 1967

No. 823

UNIFORMED SANITATION MEN ASSOCIATION, INC., *et al.*,

Petitioners,

—against—

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

Preliminary Statement

Petitioners ask this Court, upon a writ of certiorari granted on January 29, 1968 (R. 91a),* to review a judgment of the United States Court of Appeals for the Second Circuit, entered on September 20, 1967 (R. 90a-91a). That judgment unanimously affirmed a judgment of the United States District Court for the Southern District of New York which dismissed petitioners' compiaint for failure to state a claim on which relief can be granted (R. 75a-78a).

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* References designated "R." refer to the Joint Appendix filed in this Court.

Questions Presented

1. May a municipal employee be dismissed for refusing to answer questions concerning the proper performance of his duties on the ground that his answers would tend to incriminate him, or for withholding information by refusing to sign a waiver of immunity from prosecution when called to testify about his employment by a grand jury, and then failing to justify or explain his action at a hearing where he was given full opportunity to do so?

2. Were petitioners' dismissals rendered unlawful because the City Commissioner of Investigation, pursuant to court order, intercepted and recorded telephone conversations over a telephone leased by the City to transact official business, to which conversations certain of the petitioners were parties, even though no evidence derived from the interceptions was offered against the petitioners in any subsequent proceeding?

Relevant Statutes

The primary statutes involved, Section 1123 of the New York City Charter, Section 813-a of the New York Code of Criminal Procedure, Federal Communications Act of 1934, 47 U.S.C. §§ 501, 605, and New York State Civil Service Law § 75, are set forth in the Appendix, infra, pp. 34-39.

The Facts

The material facts are not in dispute. Petitioners were formerly employees of the New York City Department of Sanitation assigned to the Marine Transfer Station at 91st Street and the East River in Manhattan. In the fall of

1966 the City Commissioner of Investigation learned that Sanitation Department employees were failing to charge private cartmen proper fees for the use of City facilities at the Marine Transfer Station. Instead, the employees were alleged to have diverted fees to their own use resulting in a loss of income to the City of hundreds of thousands of dollars (R. 5a, 71a-72a).

In the course of his investigation, the Commissioner obtained authorization from Supreme Court, New York County, under the provisions of Section 813-a of New York Code of Criminal Procedure, to tap a telephone (AT 9-7935) leased by the Department of Sanitation for the transaction of official business at the Marine Transfer Station. This official City telephone was the only line tapped in the investigation (R. 72a).

In November, 1966, the Commissioner or his deputy questioned petitioners concerning their duties and employment (R. 41a-65a). Prior to being questioned they were advised of their right to counsel, their right to remain silent and not be compelled to be a witness against themselves, and that anything they said could be used against them. They were also apprised of the provisions of Section 1123 of the New York City Charter which provides for dismissal where a City employee fails to testify concerning the property, government or affairs of the City or his official conduct on the ground that his answer would tend to incriminate him (R. 73a-74a). Twelve of the petitioners refused to answer claiming the constitutional privilege against self-incrimination. Three of the petitioners were interrogated and gave answers without claiming the privilege against self-incrimination (R. 6a).

On December 2, 1966, the Commissioner of Sanitation suspended the petitioners. Those who had refused to testify on the basis that their answers would tend to incriminate them were advised that their suspensions were based on Section 1123 of the City Charter. The others were advised that their suspensions were based on information received from the Commissioner of Investigation concerning irregularities arising out of their employment (R. 7a, 45a, 53a).

On December 14, 1966, petitioners commenced this action for declaratory judgment and injunctive relief. As of that date petitioners had been suspended but not dismissed from their employment. Subsequently, on December 16, 1966, the Commissioner of Sanitation issued formal charges under Section 75 of the New York Civil Service Law against the twelve petitioners who had refused to answer questions put to them by the Commissioner of Investigation or his deputy. At the time of argument before the District Court no hearings had been held on these charges (3a, 56a-70a).

After argument of the case in the District Court but prior to the argument in the Second Circuit Court of Appeals the following relevant events occurred.

Hearings were held on the charges made against the twelve employees who invoked the privilege against self-incrimination in their appearance before the Commissioner of Investigation. The only evidence offered against them was the transcript of proceedings before the Commissioner of Investigation. Petitioners were represented at the disciplinary proceedings by the same counsel who appeared for them in the District Court and on their appeal. No transcripts, recordings or other evidence obtained through a

wiretap were offered against petitioners or received in evidence during the disciplinary proceedings.

The three petitioners who did not assert the privilege against self-incrimination when called before the Commissioner of Investigation were later summoned to appear before a grand jury and asked to sign waivers of immunity. Each of them refused to sign a waiver. Subsequently, they were served with amended charges by the Commissioner of Sanitation to the effect that they had violated Section 1123 of the New York City Charter by their refusal to waive immunity before the grand jury.

In the hearings conducted by the Department of Sanitation the charges against those three petitioners related solely to their refusal to waive immunity before the grand jury. No evidence or testimony of any kind based upon a wiretap was offered against them.

At the disciplinary proceedings petitioners offered no testimony to explain their refusal to answer questions put to them by the Commissioner of Investigation or his deputy or their refusal to sign waivers of immunity. Their defense rested solely on claims of unconstitutionality or illegality in the proceedings.

Each of the petitioners was dismissed after the hearings for violations of Section 1123 of the New York City Charter.

Opinions Below

The District Court on respondents' motion dismissed the complaint on grounds of abstention. Subsequent to the District Court decision the New York State Court of Appeals decided *Gardner* v. *Broderick*, 20 N Y 2d 227 (1967),

which authoritatively construed Section 1123 of the New York City Charter. The Second Circuit Court of Appeals noted that this construction removed the federal abstention question from the case and proceeded to consider the merits. In its opinion, the Circuit Court held "[t]here was no invasion of appellants' constitutional rights when they were dismissed from their employment for refusing to answer questions as to their conduct of their jobs" (R. 87a). That Court also held that there had been no "trespassory intrusion into private, constitutionally protected premises" as was found to exist by this Court in *Berger* v. *New York*, 388 U. S. 41 (1967). The Circuit Court stated (R. 88a):

> "We also hold that appellants' claim based on the Commissioner's wiretap was properly dismissed. No violation of the Federal Communications Act, 47 USC §605 * * * or deprivation of rights under the Fourth Amendment has been established."

SUMMARY OF ARGUMENT

I. Respondents have not violated petitioners' privilege against self-incrimination.

Since this Court's decision in *Slochower* v. *Board of Education*, 350 U.S. 551 (1956), the courts of New York have made the implied constitutional guarantee of a full administrative hearing an integral part of the disciplinary procedure when Charter § 1123 is invoked against a public employee.

This approach is consistent with the decisions of this Court in *Lerner* v. *Casey*, 357 U.S. 468 (1958); *Beilan* v. *Bd. of Ed. of Phila.*, 357 U.S. 399 (1959); *Nelson, et al.* v. *County of Los Angeles*, 362 U.S. 1 (1960). These cases upheld the

dismissal of a public employee where he was asked questions of legitimate concern to his employer, refused to answer those questions and then failed to explain that refusal in a subsequent administrative hearing held for that purpose.

This Court's recent decisions in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967) and *Spevack* v. *Klein*, 385 U.S. 511 (1967), do not support petitioners' contentions. Both the opinion of the Court (fn. 3, at p. 516) and the concurring opinion of Mr. Justice Fortas (at p. 519), in *Spevack*, distinguish that case from the one at bar.

In light of the decision in *Garrity*, there is even less reason to support the contention that a public employee may refuse to answer questions concerning the performance of his duties, and retain his job. As a result of *Garrity*, a public employee need not fear subsequent criminal prosecution based on any testimony given to his employer or a grand jury.

II. The wiretap in this case did not violate petitioners' Fourth Amendment rights.

A. The decisions of this Court in *Berger* v. *New York*, 388 U.S. 41 (decided June 12, 1967) and *Katz* v. *United States*, 389 U.S. 347 (decided December 18, 1967), should not be given retroactive application. Under the tests established by this Court in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), *Tehan* v. *Shott*, 382 U.S. 406 (1966), *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), and *Stovall* v. *Denno*, 388 U.S. 293 (1967), the constitutional standards for eavesdrop warrants, set forth in *Berger* and *Katz*, should be applied prospectively to trials or proceedings commenced after the date of these decisions.

The basic premise of this test is that new judicial constructions of constitutional provisions have been applied retroactively where the purpose served by the new rule is preservation of the "integrity of the truth-determining process at trial . . ." *Stovall* v. *Denno*, 388 U.S. at 298. This was not the case in either *Berger* or *Katz* where there was no doubt as to the reliability of the evidence barred by the new rules.

At the time of the tap involved here, and thereafter until the decision in *Berger*, law enforcement officials could not ascertain the standards which that decision established for eavesdrop warrants; and until *Katz*, they believed that nontrespassory eavesdrops were beyond the scope of Fourth Amendment protection. Thus, there would be a substantial adverse affect on the administration of justice if *Berger* and *Katz* were applied retroactively, thereby invalidating thousands of prosecutions based on what were believed to be legal eavesdrops and wiretaps. Respondents relied on a state statute that had been held to be constitutional.

Nor is the Court presented with a situation where the rules of *Berger* and *Katz* should be applied to cases on direct appeal at the time of those decisions. Unlike the situation which the Court faced in *Linkletter* v. *Walker* and *Tehan* v. *Shott*, no decision of this Court since *Berger* and *Katz* has applied these cases on direct appeal. Therefore, the Court should apply the same test it enunciated in *Johnson* v. *New Jersey* and *Stovall* v. *Denno* and apply the new rules to proceedings commenced after the decisions in *Berger* and *Katz*.

B. Even if the doctrines of *Berger* and *Katz* are applied retroactively, the wiretap did not taint the subsequent proceedings.

No evidence secured through the tap was ever used against petitioners. The tap was not used to identify peti-

tioners as suspects, nor as the basis for the investigation. Instead, the tap was the source of certain questions which petitioners refused to answer. Under these circumstances, any alleged taint, caused by the tap, has been dissipated. *Nardone* v. *United States*, 308 U.S. 338; *United States* v. *McGavic*, 337 F. 2d 317 (6th Cir. 1964); *Rogers* v. *United States*, 330 F. 2d 535 (5th Cir. 1964); *Hollingsworth* v. *United States*, 321 F. 2d 342 (10th Cir. 1963).

C. Petitioners have not established a violation of their Fourth Amendment rights under the doctrines of *Berger* and *Katz*. This Court has not held that warrants meeting Fourth Amendment standards are required in all cases where conversations are seized. Under the facts of this case, petitioners could not reasonably expect that calls made on the phone at the 91st Street Marine Transfer Station would be free from interception by their employer during an authorized investigation into irregularities regarding the performance of their duties.

Although not indicated in the record, the facts here differ markedly from those presented in *Katz*. If the Court should reach the constitutional question of the validity of the tap under the Fourth Amendment, the case should be remanded to the District Court in order to develop a record which would permit a sound constitutional determination as to whether the tap of this government-owned phone, in light of all the circumstances, including the regulations governing the use of this phone, was an unconstitutional search and seizure.

D. While an unconstitutional wiretap would be inadmissible in a state court proceeding under *Mapp* v. *Ohio*, 367 U.S. 643 (1961), a finding of a violation of § 605 of the Fed-

eral Communications Act alone, does not sustain petitioner's claims.

Under *Schwartz* v. *Texas,* 344 U.S. 199, the exclusionary rule applicable to violations of constitutional provisions by state officials, does not apply to such violations of federal statutes. Further, for the reasons cited in B, above, there is no causal connection between the tap and petitioners' subsequent dismissals.

POINT I

As applied in New York, in administrative practice and through judicial interpretation, Charter §1123 meets the constitutional requirements of due process expressed by this Court in *Slochower v. Board of Education* and subsequent decisions.

In *Slochower* v. *Board of Education,* 350 U. S. 551 (1956), this Court was called upon to review a dismissal pursuant to §903 of the New York City Charter (predecessor to the present §1123). Slochower, a Brooklyn College professor, was summarily dismissed pursuant to §903 for failing to answer questions concerning his membership in the Communist Party before a Senate Subcommittee on Internal Security. This Court overruled the holding of the New York Court of Appeals that under §903 an assertion of the privilege against self-incrimination in defiance of the Charter provision is equivalent to a resignation, saying:

> "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occuring before a federal committee whose inquiry was announced as not directed at 'the property, affairs

> or government of the city, or * * * official conduct of city employees.' * * *
>
> "The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with the real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law." 350 U.S. at pp. 558-559.

Subsequent to *Slochower* this Court has held that state statutes authorizing the dismissal of public employees who fail to answer questions in an investigation of matters of legitimate concern to the state or agency involved do not violate due process where a hearing is held prior to dismissal. *Lerner* v. *Casey*, 357 U. S. 468 (1958); *Beilan* v. *Bd. of Ed. of Phila.*, 357 U. S. 399 (1959); *Nelson, et al.* v. *County of Los Angeles*, 362 U. S. 1 (1960). In each of these cases, appellants were dismissed pursuant to the relevant statute, after a hearing before an appropriate administrative body at which time they were given the opportunity to explain their refusal to testify. The ultimate dismissal in each instance was based not on the mere refusal to testify but on the breach of legitimate conditions of employment—candor and integrity—that the refusal reflected. This is not at all the built-in inference of guilt imputed to an employee's invocation of the privilege which this Court condemned in *Slochower* and *Nelson*.

In the case at bar, upon their refusal to testify before the Commissioner of Investigation or their failure to waive immunity and testify before the Grand Jury, each of the fifteen petitioners was subsequently given a full hearing

before the Commissioner of Sanitation. This hearing dealt with petitioners' refusal to answer questions concerning the performance of their job.

It should be noted that in *Lerner* and *Beilan* Mr. Justice Douglas, with whom Mr. Justice Black concurred, based his dissent, covering both cases, on the propriety of the government concerning itself with the opinions and beliefs of its employees. 357 U.S. at p. 415. The dissent, however, recognized the right of the government to inquire into the "actions of men" such as the fitness of the public employee for his job for reasons of health, promptness, record for reliability. 357 U.S. at p. 415.

Dissenting in a separate opinion, in *Lerner,* Mr. Justice Brennan stated:

> "But can we suppose that a subway conductor would be branded a security risk if he refused to answer a question about his health? Of course the answer is no, although the question is plainly relevant to his qualifications of employment. It may well be that in such a case the State would be fully justified in discharging the employee as 'untrustworthy and unreliable.'" 357 U.S. at p. 422.

Since the *Slochower* decision, the New York Courts have made the implied constitutional guarantee of "proper inquiry" an integral part of the disciplinary procedure whenever §1123 is invoked against a public employee. *Gardner* v. *Murphy,* 46 Misc. 2d 728 (Sup. Ct., N.Y. Co., 1965); *Conlon* v. *Murphy,* 24 AD2d 737 (1st Dep't., 1965). In *Gardner,* the court reviewed this Court's decisions which recognized both the interest of the government in the loyalty of its employees and the need to protect the constitutional rights of those employees, and found:

> "Logic thus dictates the post-*Malloy* v. *Hogan* (378 U.S. 1) applicability to State proceedings of the doctrine enunciated in *Slochower* v. *Board of Educ.* (350 U. S. 551); Automatic dismissal from public employment predicated *solely* upon one's invocation of the Fifth Amendment privilege against self-incrimination is proscribed by the United States Constitution * * *." 46 Misc. 2d at p. 734.
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> * * * * *
>
> "If the mere statement of present refusal to waive one's Fifth Amendment rights is interpreted as a prima facie rather than a conclusive basis for discharge, the subject provisions are not repugnant to constitutional mandates as mirrored by the United States Supreme Court pronouncements." *Ibid.*, at p. 736.

The New York courts consider notice and a hearing in proceedings under §1123 as not merely a *pro forma* requirement, but as a substantive administrative remedy afforded petitioners in this case. This reflects the concern expressed by this Court in *Slochower*, that absent such a hearing:

> "No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which the are directed, or justification for exercise of the privilege." 350 U. S. at p. 558.

The decision of the New York Court of Appeals in *Gardner* v. *Broderick*, 20 N Y 2d 227 (1967), now before this Court, would appear to have ended any uncertainty as to the New York Court of Appeals' interpretation of §1123.

In upholding Gardner's dismissal under § 1123 for failure to waive immunity and testify before a grand jury, the Court of Appeals cited *Nelson* v. *County of Los Angeles*,

362 U. S. 1 (1960) for the proposition that there was no violation of the privilege against self-incrimination where the employee had a hearing and the information sought concerned the performance of his duties as a public employee.

Petitioners seek to characterize the proceedings before the Commissioner of Investigation and the Grand Jury as criminal investigations rather than disciplinary proceedings (Pet. Br., pp. 15-16). Such characterization is neither helpful nor relevant.

The City employs over 300,000 persons in various jobs of varying responsibility. These employees are supervised, and their conduct on the job investigated, in a number of ways. If the inquiry here were limited merely to petitioners' competency to perform their tasks, then the only proper official to make such inquiry would be the Commissioner of Sanitation or his authorized deputy. But the inquiry here, though related to the performance of petitioners' duties, also concerned misconduct amounting to a criminal act. In such instances, the protection of the City's interests is entrusted to the Commissioner of Investigation. Further, any testimony given by City employees before a grand jury must be, and was, limited to matters concerning their conduct as City employees, in order for § 1123 to be applicable.

Petitioners also persist in contending that the City has dismissed them merely for exercising their constitutional right to remain silent. In support of this contention they cite two recent decisions of this Court, *Garrity* v. *New Jersey*, 385 U. S. 493 (1967) and *Spevack* v. *Klein*, 385 U. S. 511 (1967). As to *Garrity*, the Circuit Court below noted that "that holding has no application to the present case

where the employees did not testify, but relied upon their claims of privilege'' (R. 87a). *Garrity* held only that where testimony was given by public employees under circumstances where failure to testify could lead to dismissal, their testimony could not be used against them in subsequent criminal prosecutions. The *Garrity* case would appear, therefore, to remove any basis for a refusal by a government employee to answer questions concerning his official duties when questioned by duly authorized government officials charged with the duty of investigating the employee's conduct. *Garrity* establishes that the employee's answers may not be used against him in a criminal proceeding. Obviously this ruling would also extend to any evidence discovered as a result of his answers.

In view of the unavailability of the answers for use in any criminal proceeding, the Fifth Amendment should not be extended to bar questioning of government employees to obtain information concerning crime or to determine whether they have been guilty of misconduct in performing their official duties. It is true that the immunity obtained as a result of giving answers when so questioned is not given with the formality of a specific grant of immunity and that the scope of the immunity is not so broad as that given under such a grant. The immunity, however, would appear to be broad enough to satisfy Fifth Amendment requirements since it extends to the answers and the fruits of the answers. In *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52, 79 (1964), this Court held that a similar immunity with regard to federal prosecution, limited to compelled testimony and its fruits, satisfied the requirements of the Fifth Amendment.

As to the effect of the decision in *Spevack*, which involved the disbarment of an attorney, this Court noted that it did not reach the question of the discharge of a public employee who refused to testify in disciplinary proceedings (fn. 3, 385 U. S. at p. 516):

> "3. Whether a policeman, who invoked the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we do not reach."

The distinction between *Spevack* and the present case was also made clear by Mr. Justice Fortas in his concurring opinion. He stated (385 U. S. at p. 519):

> "I would distinguish between a lawyer's right to remain silent and that of a public employee who is asked questions specifically, directly and narrowly relating to the performance of his official duties as distinguished from his beliefs on other matters that are not within the scope of the specific duties which he undertook faithfully to perform as part of his employment by the State. This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer."

Despite the obvious legitimate interest of the City in the fitness of its employees to perform their duties and the need for employees to cooperate in an official inquiry on this question, petitioners claim the right (1) to refuse to answer questions concerning their employment put to them by properly authorized City officials or to withhold information by refusing to sign a waiver of immunity when called to testify before a grand jury, (2) to refuse to offer any explanation or justification for such refusal at a hear-

ing especially called for that purpose, and (3) to retain their City employment. This is not the law.

In its opinion below the Court of Appeals stated (R. 87a):

> "It was surely proper for a city official charged with the duty to do so to investigate charges of misfeasance in the operation of the Sanitation Department and in connection with such an investigation to question employees about their participation in activity which reflected the possibility of bribery and embezzlement. Can there be any reasonable doubt that an employee, especially one who has been warned of the consequences of his refusal to answer, can be (and, indeed, should be) discharged for such refusal?"

A City employee has the right to refuse to answer when questioned about his employment by appropriate City officials but he does not have a right to fail to justify or explain his refusal at a hearing called to afford him that opportunity, and at the same time retain his job.

POINT II

The use of a wiretap in this case by the Commissioner of Investigation did not violate petitioners' constitutional rights under the Fourth and Fourteenth Amendments.

A. *Berger* and *Katz* Should Not Be Given Retroactive Application.

Petitioners' claim that the wiretap violated the Fourth Amendment's proscription against unreasonable searches and seizures rests primarily on the decisions of this Court in *Berger* v. *New York*, 388 U.S. 41 (decided June 12, 1967)

and *Katz* v. *United States*, 389 U.S. 347 (decided December 18, 1967). *Berger* applied Fourth Amendment standards to trespassory eavesdrops and *Katz* specifically held that non-trespassory eavesdrops, *e.g.*, wiretaps, were also subject to constitutional scrutiny.

Assuming, *arguendo*, that under the decisions in those cases the tap carried out by the Commissioner of Investigation did violate petitioners' rights under the Fourth and Fourteenth Amendments, the doctrines established in *Berger* and *Katz* should not be applied retroactively to this case. Under the tests established by this Court in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), *Tehan* v. *Shott*, 382 U.S. 406 (1966), *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), and *Stovall* v. *Denno*, 388 U.S. 293 (1967), the constitutional standards for eavesdrop warrants, set forth in *Berger* and *Katz*, should be applied prospectively to trials or proceedings commenced after the date of these decisions. As the Court noted in *Linkletter*, *supra*, "The Court may in the interest of justice make the rule prospective * * * where the exigencies of the situation require such an application" 381 U.S. at 628.

In determining whether new constitutional rules should be applied retroactively, this Court has adhered to the following standard:

> "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno*, 388 U.S. at p. 297.

See also *Linkletter* v. *Walker*, 381 U.S. at p. 636; *Johnson* v. *New Jersey*, 384 U.S. at p. 727; *Tehan* v. *Shott*, 382 U.S. at pp. 410, 413.

Thus, new judicial constructions of constitutional provisions have been applied retroactively where the purpose served by the new rule is preservation of the "integrity of the truth-determining process at trial * * *". *Stovall* v. *Denno*, 388 U.S. at 298. Examples of such rules are the right to trial counsel, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the right of an indigent to a fair appeal, *Griffin* v. *Illinois*, 351 U.S. 12 (1956), and the right to a procedure which leads to a fair appraisal of the voluntariness of a confession, *Jackson* v. *Denno*, 378 U.S. 368 (1964). In each of these cases the new rule was applied retroactively.

As the Court reasoned in *Johnson*:

> "In *Linkletter* we declined to apply retroactively the rule laid down in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), by which evidence obtained through an unreasonable search and seizure was excluded from state criminal proceedings. In so holding, we relied in part on the fact that the rule affected evidence 'the reliability and relevancy of which is not questions.' 381 U.S., at 639. * * *
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> * * * * *
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> "[I]n *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), which concerned the right of an indigent to the advice of counsel at trial, we reviewed a denial of habeas corpus * * * In [this] instance we concluded that retroactive application was justified because the rule affected 'the very integrity of the fact finding process' and averted 'the clear danger of convicting the innocent.' *Linkletter* v. *Walker*, 381 U.S., at 639; *Tehan* v. *Shott*, 382 U.S., at 416." 384 U.S., at pp. 727-28.

Applying this reasoning to *Johnson*, this Court refused to apply retroactively its decisions in *Escobedo* v. *Illinois*, 378 U. S. 479 (1964) and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), both of which broadened persons' rights under the Fifth Amendment. Similarly, in *Stovall* v. *Denno*, *supra*, the Court applied its decision in *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 363 (1967), prospectively in cases involving the right to counsel at pre-trial confrontations.

In the case at bar there is no compelling reason to apply retroactively the new standards enunciated in *Berger* and *Katz*. The purpose of these new rules is to protect the privacy of certain conversations against future invasions by law enforcement officers through searches that do not meet Fourth Amendment standards. Here, as in the applications of *Mapp*, *Escobedo*, *Miranda*, *Griffin*, *Wade*, and *Gilbert*, any past infringement of petitioners' rights, resulting from actions based on constitutionally inadequate state procedures, can no longer be rectified. Even more than in *Mapp*, *Escobedo*, *Miranda*, *Griffin*, *Wade*, and *Gilbert*, the new rules in *Berger* and *Katz* do not affect the integrity of the fact-finding process. There is no allegation that the wiretap evidence, even if it had been used, was unreliable. The new rules in *Berger* and *Katz* were designed to control the obtaining and use of admittedly reliable evidence. The extension of Fourth Amendment protection to eavesdrops was dictated by this Court's conclusion that its prior decisions did not provide sufficient safeguards against unconstitutional invasions of privacy. Such a purpose is not furthered by the retroactive application of the new rule.

Moreover, in this case there is no allegation that evidence obtained from the allegedly unconstitutional wiretap was

used against petitioners in any subsequent proceeding. Rather, the argument is made that the wiretap triggered a series of events leading to an impairment of petitioners' privilege against self incrimination. Yet, in *Escobedo* and *Miranda,* involving more serious aspects of the Fifth Amendment's privilege against self-incrimination, this Court held that those decisions applied only to trials beginning after the date of each decision. Certainly, the claims of petitioners, with regard to the new rules in *Berger* and *Katz,* do not merit greater consideration than was accorded Johnson with regard to the application of *Escobedo* and *Miranda.*

The other two tests established by this Court for determining whether new rules are to be applied retroactively are equally compelling in arguing for prospective application of *Berger* and *Katz.* There is little doubt that the Commissioner of Investigation has relied on the past decisions of this Court concerning wiretapping and eavesdropping, and there would be a substantial adverse effect on the administration of justice if *Berger* and *Katz* were applied retroactively, thereby invalidating thousands of prosecutions secured through the use of eavesdrops and wiretaps.

At the time of the tap by the Commissioner of Investigation, his conduct was not proscribed under the Fourth Amendment standards subsequently established in *Berger* and made specifically applicable to non-trespassory eavesdrop orders in *Katz.* The court order here, secured in 1966, was obtained pursuant to a statute that had been held not to violate the Constitution. *Harlem Check Cashing Corp.* v. *Bell,* 296 N.Y. 15 (1946); *People* v. *Stemmer,* 298 N.Y. 728 (1948), *aff'd.* by an equally divided court, 336 U.S. 963, *petition for rehearing denied,* 337 U.S. 921. In light of the

settled authority prior to *Berger*, the United States Court of Appeals for the Second Circuit held, in 1961, that a claim under 28 U.S.C. §2281 that Criminal Code §813-a "contravenes the Fourth or Fifth Amendment to the Federal Constitution was insubstantial * * * ". *Williams* v. *Ball*, 294 F. 2d 94 (2d Cir. 1961) *cert. den.*, 368 U.S. 990.

Respondents' reliance on pre-*Berger* standards influenced not only their actions but their presentation of their case to the district court. If respondents had known, in December, 1966, what the Court made clear in *Berger* and *Katz*, respondents might have attempted to demonstrate that the investigation was based on independent evidence free from the taint of the wiretap. Also, respondents might have attempted to show that the wiretap order in this case met the standard established in *Berger* and *Katz*.

Finally, the administration of justice would be seriously impaired by casting the shadow of illegality over proceedings undertaken in good faith by law enforcement officials. As the New York Court of Appeals noted in *People* v. *Kaiser*, 21 N.Y. 2d 86, at p. 98:

> "Thousands of eavesdropping orders have been issued in reliance upon the statute [813-a] and the decisions of this court which the Supreme Court had seen fit not to disturb. (See *People* v. *Dinan*, 11 NY 2d 350, cert. den. 371 U.S. 877; *People* v. *Pugach*, 16 NY 2d 504, app. dsmd. 383 U.S. 575; *People* v. *Cohen*, 18 NY 2d 650, cert. den. 385 U.S. 976, rehearing den. 385 U.S. 1032.)"

Until *Berger*, law enforcement officials could not ascertain the standards which that decision established for eavesdrop warrants, and until *Olmstead* and *Goldman* were overruled in *Katz*, law enforcement officials in good faith believed that

non-trespassory eavesdrops, *e.g.*, wiretaps, were beyond the reach of the Fourth Amendment. To apply these new rules to proceedings and trials which commenced prior to the decisions in *Berger* and *Katz* would threaten the finality of large numbers of convictions based on reliable evidence frequently secured, as in the case of New York, under a statute assumed to be constitutional under prior decisions of this Court. (See statutes cited in *Berger*, 388 U.S. at pp. 47-48, fns. 4, 5).

It should be noted that *Linkletter* and *Tehan* held that *Mapp* and *Griffin* applied to cases still on direct appeal at the time they (*Mapp* and *Griffin*) were decided, whereas *Johnson* and *Stovall* held that the doctrines established in *Escobedo, Miranda, Wade*, and *Gilbert* applied only to trials beginning after the dates they (*Escobedo, Miranda, Wade*, and *Gilbert*) were decided. However, this court in *Johnson* made clear the reason for those exceptions to the general rule of prospective application:

> "Our holdings in *Linkletter* and *Tehan* were necessarily limited to convictions which had become final by the time *Mapp* and *Griffin* were rendered. Decisions prior to *Linkletter* and *Tehan* had already established without discussion that *Mapp* and *Griffin* applied to cases still on direct appeal at the time they were announced. See 381 U.S., at 622 and n. 4; 382 U.S., at 409, n. 3. On the other hand, apart from the application of the holdings in *Escobedo* and *Miranda* to the parties before the Court in those cases, the possibility of applying the decisions only prospectively is yet an open issue." 384 U.S. at p. 732.

Petitioners here are in the same posture as was *Johnson*. This is the first case to reach this Court which involves the application of the *Berger* and *Katz* cases to a state proceeding, completed prior to those decisions, in which the

government had obtained a wiretap order which was valid at the time it was issued.

Nor can it be argued that *Katz* applied the *Berger* standards to a case on direct appeal. *Berger* and *Katz* do not stand for the same proposition. Prior to *Berger* non-trespassory eavesdropping was still excluded from Fourth Amendment protection because of this Court's decisions in *Olmstead* and *Goldman*. *Berger* did not alter this doctrine.

As the New York Court of Appeals noted in *People* v. *Kaiser*, 21 N.Y. 2d 86, 100-01 (1967):

> "While Mr. Justice Clark [in *Berger*] indicates that that portion of *Olmstead* which held that speech was not capable of seizure has been 'negated' by subsequent cases, [*Goldman* v. *U.S.*, 316 U.S. 129; *Silverman* v. *U.S.*, 365 U.S. 505; *Clinton* v. *Virginia*, 377 U.S. 158] nowhere does his opinion state that the basis of the decision in *Olmstead* that wiretapping accomplished without an intrusion into the caller's premises infringes no constitutional right—has been negated by any subsequent decision. • • •
>
> • • • • •
>
> "The Court's apparent intention to stick to a distinction which can survive only as long as *Olmstead* remains viable, is evidenced in the closing paragraph of the *Berger* opinion."

In *Berger*, the Court confirmed this interpretation in the closing sentence of its opinion:

> "Our concern with the statute here is whether its language permits a trespassory invasion of the home, by general warrant, contrary to the command of the Fourth Amendment. As it is written, we believe it does." 388 U.S. at p. 64.

In this posture, *Katz* represented the first explicit statement that the Constitution also protected non-trespassory eavesdrops. It was in *Katz*, not *Berger*, or earlier cases, that the Court said:

> "We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." 389 U.S. at p. 353.

Thus, there is no reason to apply a test of prospective application different from that enunciated in *Johnson* and *Stovall*. The new rules should apply only to proceedings commenced after the decisions in *Berger* and *Katz*.

B. The Tap Did Not Taint the Subsequent Proceeding.

Petitioners contend that they were invalidly dismissed because the dismissal was based on the exercise by petitioners of their privilege against self-incrimination. These dismissals are connected to the wiretap by a tenuous series of links. It is alleged that an unconstitutional wiretap formed the basis for the investigation, which led to the inquiry before the Commissioner of Investigation, which led to the invocation of the privilege, which led to the hearing, which led to the dismissals.

Under the circumstances of this case, even if the Court applies retroactively the rules established in *Berger* and *Katz*, and even if the tap failed to meet the constitutional standards established by those cases, the subsequent disciplinary proceedings should not be invalidated. Instead, the Court should apply the common sense rule of *Nardone* v. *United States*, 308 U.S. 338, which applied the "fruit of the

poisonous tree" doctrine to wiretaps. As Mr. Justice Frankfurter said:

> "Sophisticated argument may prove a causal connection between information obtained through illicit wiretapping and the Government's proof. As a matter of good sense, however, such a connection may have become so attenuated as to dissipate the taint." (p. 341).

In this case the central question is whether the City may require an employee to answer questions regarding his employment and whether it may dismiss that employee for failing to answer such questions. If the City has this right, the source of the questions, assuming the source to be an unconstitutional wiretap, should not taint the proceeding. It should be remembered that the evidence obtained by the tap was not introduced. Rather, it was the failure to respond to questions allegedly derived from the tap which led to the dismissal.

If the City used illegal means in gathering evidence, such evidence or its fruits could never be used against the person from whom it was seized. Moreover, if an employee was coerced to incriminate himself because he was confronted with illegally obtained evidence, such confession or testimony could not be used against him. *United States* v. *Tane*, 329 F. 2d 848 (2d Cir. 1964); *People* v. *Rodriguez*, 11 N.Y. 2d 279 (1962).

In the instant case, neither the wiretap nor its fruits were used and the tap did not induce a confession. Instead, petitioners chose to assert their Fifth Amendment privilege either before the Commissioner of Investigation or before the Grand Jury. The result of the tap was a refusal to

answer. In the absence of the use of the evidence, these proceedings do not present a judicially cognizable violation of Fourth Amendment rights.

Yet, petitioners would have this Court hold that the wiretap precludes the City from questioning its employees about their jobs, or imposing disciplinary action for insubordination, or invoking other sanctions, even though no evidence from the illegal "search" was introduced against petitioners. Such a holding would distort beyond reason the common sense rule of *Nardone.*

Nor can it be contended that the tap was used to identify the Petitioners, as in *Tane, supra.* It was reasonable to expect that all the employees at the 91st Street Transfer Station would be called before the Commissioner of Investigation. By the nature of the operation of that facility all of the employees would have known of the improper acts of any of them. As the record indicates (R. 71a), the investigation and the subsequent tap were undertaken as a result of information received from a reliable informant. The tap was neither the basis for the investigation, nor the means of identifying the Petitioners as suspects; nor did evidence obtained from the tap provide the basis for their dismissals. Under these circumstances, the taint of the illegal tap, if indeed the tap was illegal, had been dissipated. See *United States* v. *McGavic,* 337 F. 2d 317 (6th Cir. 1964); *Rogers* v. *United States,* 330 F. 2d 535 (5th Cir. 1964); *Hollingsworth* v. *United States,* 321 F. 2d 342 (10th Cir. 1963).

C. Petitioners Fail to Establish a Violation of Fourth Amendment Rights Under the Standards Established in *Katz* and *Berger*.

As a result of *Berger* and *Katz*, it is clear that eavesdropping by law enforcement officials could constitute an unreasonable search and seizure, within the meaning of the Fourth Amendment. In *Katz*, the Court specifically held that a nontrespassory eavesdrop must meet the specific standards of the Fourth Amendment, including, as a general rule, the requirements of a warrant.

It was not the holding of this Court, however, either in *Berger* or *Katz*, that search warrants in full compliance with the Fourth Amendment must be used in all cases where conversations are "seized." Nor is it the contention of respondents that the City of New York is free to tap all its phones at all times, without warrants, merely because these phones are leased by the City. As the Court noted in *Katz*:

> "The Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. * * *
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> * * * * *
>
> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See *Lewis* v. *United States*, 385 U.S. 206, 210; *United States* v. *Lee*, 274 U.S. 559, 563. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. See *Rios* v. *United States*, 364 U.S. 253; *Ex parte Jackson*, 96 U.S. 727, 733." 389 U.S. at pp. 350-52.

Thus, under this test the question to be answered is whether petitioners could reasonably have expected that calls made on the phone at the 91st Street Marine Transfer Station would be free from interception by their employer, during an authorized investigation into irregularities regarding the performance of their duties.

Certain facts readily distinguish this case from *Katz*. Although these facts do not appear in the record, they are mentioned here for purposes of indicating to the Court the factors which the trial court should consider in determining whether the obtaining of wiretap evidence in this case was a violation of petitioners' Fourth Amendment rights, if the Court concludes that this issue should be reached in this case.

For example, the phone tapped by the Commissioner of Investigation was a City phone, used exclusively for the transaction of official business. It was the only telephone (with one extension) at the Transfer Station. It was not assigned to any individual employee. Department regulations prohibited any unauthorized use of the phones at that or any other Sanitation facility. The phone was not open to the public.

In *Katz*, on the other hand, the telephone which was "bugged" was a public phone which a person could expect to use in privacy when he paid his toll. In *Katz* there was only one suspect involved, who used the phone at regular times each day. As the Court noted, these were circumstances in which the warrant defining the limits of the search was most appropriate. In the case at bar, nearly all of the petitioners used the phone (R. 41a-62a) throughout working hours at the facility, which is open 24 hours a day.

Under these circumstances a trial court may find that a court order is neither practicable nor necessary or that the petitioners could not reasonably have expected privacy during the unauthorized use of the phone, particularly from intrusion by a City official who had a duty to discover and expose the misuse of City property.

Under circumstances analogous to the instant case, the Court of Appeals for the Second Circuit, in *United States* v. *Collins*, 349 F. 2d 863, *cert. den.*, 383 U.S. 960 (1965), declined to find a invasion of privacy. It sustained the conviction of a federal employee for mail theft where the primary evidence was obtained by a search, without a warrant, of defendant's office desk and jacket. In holding this to be a reasonable search and seizure, the Court said (349 F. 2d at pp. 867-868):

> "We have no doubt that the search of defendant's work area, including the surface and interior of his desk, conducted by Customs agent McDonnell and Post Office Inspector Forster was a constitutional exercise of the power of the Government as defendant's employer, to supervise and investigate the performance of his duties as a customs employee. Defendant was handling valuable mail for which the Government was responsible. The agents were not investigating a crime unconnected with the performance of defendant's duties as a Customs employee."

This Court has never held that all searches and seizures by government officials, made without a warrant, violate the Fourth Amendment. Experience has evolved rules concerning, for example, searches incident to a lawful arrest, *Agnello* v. *United States*, 269 U.S. 20 (1925), *Ker* v. *California*, 374 U.S. 23 (1962); searches of moving vehicles,

Carroll v. *United States,* 267 U.S. 132 (1925), *Brinegar* v. *United States,* 338 U.S. 160 (1948); and, most recently, administrative inspectional searches, *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), *See* v. *Seattle,* 387 U.S. 541 (1967). In *Berger* and *Katz* this Court charted new areas of constitutional protections when it specifically applied Fourth Amendment protections to conversations, including those garnered by non-trespassory eavesdrops. As in the case of the seizure of objects, or in the development of procedures for administrative inspectional warrants, experience in this evolving area of law militates against the adoption of a rule which would apply strict Fourth Amendment standards to all eavesdrops by the government of its employees' conversations.

This Court should recognize the legitimate need of government to ascertain whether its equipment, including its phones, is being used in an unauthorized manner for non-governmental purposes. Respondents do not suggest that government employees do not have a right to privacy with regard to their conversations, even on government phones. Respondents do contend, however, that the facts of this case, if fully developed in an adequate record, would establish that the tap of this phone, under the circumstances surrounding the tap, was not an unreasonable search and seizure. If this Court finds it necessary to reach this constitutional question in light of the compelling arguments already made concerning the retroactive application of *Berger* and *Katz* and the tenuous link between the tap and these proceedings, the Court should remand in order for the trial court to ascertain the facts upon which a sound constitutional determination could be made.

D. The Alleged Violation of Section 605 of Federal Communications Act Does Not Invalidate the Dismissal of Petitioners.

Petitioners contend that the wiretap used by the Commissioner of Investigation violated their rights under §605 of the Federal Communications Act and thus, all subsequent proceedings are invalid.

Even if there had been a violation of §605, for the reasons stated in subdivision (B), above, there was no causal connection between the interception of the conversations involving petitioners and their subsequent dismissals. Neither the tapped conversations nor any evidence obtained through them was ever used against petitioners in their disciplinary hearing or in any subsequent proceeding. Their dismissals were based on their refusal to answer questions relating to their duties, or on their withholding of information by refusing to waive immunity from prosecution when called before the grand jury.

If the Court, however, were to determine that the tap did affect subsequent events, the use of such evidence, or its fruits, is permitted in state proceedings under the doctrine of *Schwartz* v. *Texas,* 344 U.S. 199 (1952). In light of that decision, this Court should reject the argument that *Mapp* v. *Ohio,* 367 U.S. 643 (1961), which required the exclusion of evidence obtained in violation of the Fourth Amendment in state as well as federal courts, overruled *Schwartz.* In *Pugach* v. *Dollinger,* 365 U.S. 458 (1961), decided only a few months prior to *Mapp,* this Court reaffirmed the *Schwartz* doctrine. While an unconstitutional wiretap would be inadmissible in state trials under *Mapp,* a finding of a violation of §605 alone does not sustain petitioners' claims.

CONCLUSION

The judgment below should be affirmed.

April 12, 1968.

Respectfully submitted,

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APPENDIX

New York City Charter §1123:

> "Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency. (Derived from former §903.)"

New York State Code of Criminal Procedure §813-a:

> "Ex parte order for eavesdropping. An ex parte order for eavesdropping as defined in subdivision one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that

there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extention or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same."

Communications Act of 1934, 47 U.S.C. §501, §605:

"§501. General penalty

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or

fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both. June 19, 1934, c. 652, Title V, §501, 48 Stat. 1100; Mar. 23, 1954, c. 104, 68 Stat. 30.

* * *

"§605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by

the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, §605, 48 Stat. 1103."

New York State Civil Service Law §75:

"*Removal and other disciplinary action*

1. Removal or disciplinary action. A person described in paragraph (a) or paragraph (b), or paragraph (c) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

* * *

2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such office or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

3. Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period riod not exceeding thirty days.* * * If he is acquitted, he shall be restored to his position with full pay for the period of suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such

period. If such officer or employee is found guilty, a copy of the charges, his written answer thereto, a transcript of the hearing, and the determination shall be filed in the office of the department or agency in which he has been employed, and a copy thereof shall be filed with the civil service commission having jurisdiction over such position. A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished to him without charge.

Supreme Court of the United States

October Term, 1967

No. 823

UNIFORMED SANITATION MEN ASSOCIATION, INC., ET AL.,

Petitioners,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, ET AL.,

Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I.

Section 1123 is unambiguous, and provides for the automatic termination of public employment upon invocation of the privilege against self-incrimination.

A. Respondents' brief studiously avoids any reference to the language of the Charter provision whose constitutionality is the subject of this case. Instead, it is argued that the Charter may be, and has been, rewritten by administrative practice and judicial interpretation so as to provide for "a hearing . . . prior to dismissal" (Resp. Br. 11) and that as rewritten it is constitutional under the Court's decisions subsequent to *Slochower* v. *Board of Education*, 350 U.S. 551.

Respondents are in error upon both points. Section 1123 of the Charter provides for the automatic termination of employment upon assertion of the constitutional privilege in exactly the same manner as when the New

York Court of Appeals so interpreted the identically worded predecessor section in *Daniman* v. *Board of Education*, 306 N.Y. 532 (1954), *appeal dismissed*, 348 U.S. 933.[1] One would have thought that this decision, the only interpretation of the Charter provision in question by New York's highest state court would have been discussed by respondents. Instead, they incorrectly urge (Resp. Br. 12-13) that subsequent state court decisions have, in effect, reversed the New York Court of Appeals' interpretation of the Charter provision.

It would be strange if lower court decisions could effectively change the language of the Charter contrary to the interpretation given by the highest state court. Contrary to respondents' assertions, however, such a "re-interpretation" has not occurred here. In *Gardner* v. *Murphy*, 46 Misc. 2d 728 (Sup. Ct., N.Y. Co. 1965), a state Supreme Court Justice at Special Term sought to rewrite the Charter provision in light of *Slochower* by requiring the Police Department to give the employees a hearing before dismissal. Upon the Police Commissioner's appeal to the Appellate Division with respect to one of the policemen who was the subject of the *Gardner* decision, the Corporation Counsel of the City of New York successfully urged a construction of the Charter contrary to that which he now presents. He said:

> "A hearing, presumably before the Police Commissioner, following petitioner's appearance before the Grand Jury, would have been a useless formality. There can be no dispute as to the essential facts that make the Charter section operative: petitioner's appearance before the Grand Jury, a request by the District Attorney that he sign a waiver of immunity with respect to the performance of his official duties and his refusal to sign such a waiver. No discretion

[1] As indicated in petitioners' brief at p. 9, § 903 of the Charter, held unconstitutional in *Slochower*, is identical in language with § 1123 involved in this case.

> is vested in any commissioner or department head to disregard the mandatory provisions of the Charter section.
>
> • • •
>
> Nothing could be brought out at a hearing, even if one were required to be held, that could in any way alter the essential facts that brought Charter § 1123 into operation. The Police Commissioner properly and lawfully terminated petitioner's employment as a police officer of the City of New York." (Brief of Corporation Counsel for the appellants in *Matter of Koutnik* v. *Murphy*, 25 App. Div. 2d 197, pp. 11-12.)

The Appellate Division agreed with the Corporation Counsel's interpretation and reversed the lower court stating:

> "Section 1123 of the City Charter provides that if any officer or employee of the city shall after process willfully refuse to waive immunity on account of any matter having to do with, *inter alia*, the official conduct of any officer or employee of the city, 'his term or tenure of office or employment shall terminate and such office or employment shall be vacant'. *It will be observed that it is the event itself which terminates the employment rather than any adjudication or finding of the same.* As far as it is possible to do so, the statute provides for a procedure which is self-executing (see *Matter of Daniman* v. *Board of Educ. of City of N.Y.*, 306 N.Y. 532, 538). *It is the event which terminates the tenure*; any notice by the authority (in this case the Police Commissioner) merely fixes an effective date for the concomitants of the termination of tenure, such as salary payments, performance of duties or the like. Where the operative facts appear, the Commissioner enjoys no choice of discretion. He must recognize that the offender's connection with the department has ceased, and take whatever administrative steps are needed to give practical effect. So that it clearly appears that the statute authorized, if it did not mandate, the procedure adopted

by the Commissioner." *Matter of Koutnick* v. *Murphy*, 25 A.D. 2d 197, 200-201 (1st Dept. 1966) (emphasis added).

Respondents have not cited this case. Instead, they cite another Appellate Division decision, *Conlon* v. *Murphy*, 24 App. Div. 2d 737 (1st Dept. 1965), where the court required a hearing, not to assess the employee's refusal to testify under Section 1123, but to meet his claim that he was denied the right to consult counsel in connection with his appearance before a grand jury. This is very different from the issue here, which is whether Section 1123 provides for a hearing to assess the propriety of the assertion of the privilege or of the refusal to waive immunity.

The respondents also cite *Gardner* v. *Broderick*, 20 N.Y. 2d 227 (1967)[2] (Resp. Br. 13) to support their position that the New York courts require a hearing in proceedings under § 1123. In *Gardner*, however, the Court of Appeals did not change the interpretation of the Charter provision which it had made in *Daniman;* its opinion is silent with respect to that decision and to the decision of this Court in *Slochower*. It said nothing about a hearing procedure being written into § 1123. Instead, the court said that "section 1123 of the Charter required him, as a condition of his continued employment by the police department, to waive his constitutional privilege against self-incrimination and to answer questions regarding the conduct of his office and the performance of his official duties." *Gardner* v. *Broderick, supra*, at p. 229.

Respondents' new "saving" interpretation of the Charter is inconsistent with a line of decisions of the New York Court of Appeals which have consistently held that Article I, Section 6 of the New York State Constitution, the parallel provision of § 1123, requires an automatic dismissal

[2] This case is now before the Court, October Term, 1967, No. 635.

from office without any hearing being accorded the public official, *Canteline* v. *McLellan*, 282 N.Y. 166 (1940); see *People* v. *Harris*, 294 N.Y. 424 (1945); *People* v. *Doyle*, 286 App. Div. 276 (3rd Dept. 1955), *aff'd* 1 N.Y. 2d 732 (1956).

This position was reaffirmed by the New York Court of Appeals last week in *State of New York* v. *Perla*, No. 376 (decided April 17, 1968), where it upheld the state in an action brought, pursuant to Article I, section 6 of the New York State Constitution, to forfeit defendant's office as Commissioner of Sanitation. There, the defendant Perla had not been given a hearing following his refusal to sign a waiver of immunity before a grand jury. The court recognized that the constitutional provision required automatic termination of employment. The court did not construe the constitutional provision as requiring a hearing since such a construction would have been, as here with respect to the Charter, an unauthorized rewriting of the Constitution. Thus, in both *Perla* and *Gardner*, the New York Court of Appeals has continued to follow its ruling in *Daniman* that invocation of the constitutional privilege automatically terminates employment.[3]

Each of these decisions is equally invalid under the *Slochower* test. It is therefore unnecessary to reach the issue of the employee's duty in the absence of so explicit a mandate. As to this we agree with Dean McKay:

> "It is not easy to find in the purposes of the privilege any justification for limiting the rights of

[3] It should be noted that the 1967 proposed New York State Constitution contained a provision (Article VII, § 3) requiring the attorney-general to conduct a hearing into the fitness of a public officer or employee who refuses to execute a waiver of immunity or to testify before a grand jury. The officer or employee could only be dismissed from his position if it were found, as a result of this hearing, that the refusal to waive immunity or to testify substantially impaired his fitness to serve in office. This establishment of a hearing procedure is a recognition of the absence of such a procedure in Article I, § 6—with obvious implications as to the existence of such a procedure in § 1123.

> public employees by giving the state unlimited powers of inquiry into all matters that might touch upon the official conduct of such employees. Why should not the state bear the burden of establishing proof of misconduct or abuse of office to justify discharge when, as in *Garrity*, it may not use compelled disclosures for the purpose of convicting of crime? Why indeed should lawyers, set aside for special trust and responsibility, be preferred in this matter over public employees as a class, no matter what the official responsibility?"

McKay, *Self-Incrimination and the New Privacy*, 1967, The Supreme Court Review 193, 225-226.

Respondents' contention (Resp. Br. 12) that petitioners were given full hearings dealing with their "refusal to answer questions" ignores the fact that at such hearings petitioners could not be required to explain their reasons for invoking the privilege. As the Court stated in *Hoffman* v. *United States*, 341 U.S. 479, 486-487:

> "if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

The court below did not join in respondents' rewriting of the statute. It noted that "Section 1123 of the City Charter was cited as the legal basis for the dismissals" (R. 86a). It upheld the dismissals after stating the issue to be "whether city employees who refuse to answer questions as to their conduct in office and who plead their privilege against self-incrimination are constitutionally protected against discharge" (R. 87a).

Respondents describe as "neither helpful nor relevant" (Resp. Br. 14) petitioners' characterization of the proceedings in which the constitutional privilege was invoked "as criminal investigations rather than disciplinary proceedings". Respondents do not deny the accuracy of petitioners' characterization; indeed, they admit it by stating that the proceedings before the Commissioner of Investigation "also concerned misconduct amounting to a criminal act" (Resp. Br. 14) *and that proceedings with respect to "competency" would have to be held before the Commissioner of Sanitation. Ibid.*

Respondents' concessions underline petitioners' point that whatever this Court has said with respect to an employee's duty to account to his employer with respect to performance of his duties is inapplicable to this police investigation of alleged criminal acts. As for the grand jury proceedings, their character as a criminal proceeding is not removed because the testimony given under Section 1123 must be "limited to matters concerning their [petitioners] conduct as City employees" (Resp. Br. 14).

In addition, the Fifth Amendment right is fully applicable to punitive administrative proceedings, *In re Ruffalo*, — U.S. —, 36 L.W. 4284, 4286 (April 9, 1968); *Spevack* v. *Klein*, 385 U.S. 511, 515, in which, as in the present case, an individual is subject to the loss of a governmental license or employment as a penalty for the violation of some governmental rule or requirement. *Ex parte Garland*, 4 Wall. 333, 380; *United States* v. *Brown*, 381 U.S. 437, 450. The hearing before the Commissioner of Investigation was the initiatory stage of this quasi-criminal proceeding. Petitioners' are no less entitled to the protections of the Fifth Amendment in these proceedings than was the litigant in *Boyd* v. *United States*, 116 U.S. 616, 631-632, where the privilege against self-incrimination barred the states' power "to convict him of a crime, or to forfeit his property"; discharge from public employment deprives the em-

ployee of a similarly substantial property interest. *Greene* v. *McElroy,* 360 U.S. 474, 506-507; Reich, *The New Property,* 73 Yale L.J. 733, 734 (1964).

While there is no charge here that the petitioners refused to answer questions by their employer, it is significant that even here they would be protected by New York law. See *Schauwecker* v. *Greene,* 96 App. Div. 249 (1st Dept. 1904) and *Martin* v. *O'Keefe,* 195 App. Div. 814 (2d Dept. 1921).

B. Respondents contend that by virtue of *Garrity* v. *New Jersey,* 385 U.S. 493, the petitioners were granted a limited immunity covering their testimony and the fruits of their testimony. But the *Garrity* rule is not an immunity grant, rather it is an exclusionary rule designed to vindicate the defendant's right against coerced self-incrimination. 385 U.S. at 500. *Garrity* may be invoked as a defense to the introduction of improperly obtained or tainted evidence at trial but it does not prevent the institution of a prosecution. As a result there exists a gap between the protections of the *Garrity* exclusionary rule and the Fifth Amendment which may be asserted even as to questions, the answers to which would merely tend to establish grounds for a prosecution.

Furthermore, *Garrity,* as the respondents admit (Resp. Br. 15), does not protect the petitioners against subsequent prosecution based on independent evidence, a protection they would receive if they were formally granted immunity under New York Penal Law § 2447. As such the "*Garrity* immunity" cannot constitutionally supplant the Fifth Amendment right. This Court in *Counselman* v. *Hitchcock,* 142 U.S. 547, 585-586 as quoted in *Albertson* v. *SACB,* 382 U.S. 70, 80 stated:

> "a statute [granting immunity] is valid only if it supplies 'a complete protection from all the perils against which the constitutional prohibition was

> designed to guard . . .' by affording 'absolute immunity against future prosecution for the offense to which the question relates.' "

See also *Stevens* v. *Marks*, 383 U.S. 234, 244-245.

Murphy v. *Waterfront Comm'n*, 378 U.S. 52, is consistent with this rule, since it reaffirms the obligation of the state to grant full immunity from prosecution; any lesser rule merely applied to the federal power to prosecute after immunity was granted.

Acceptance of the respondents' argument,—here made for the first time—would result in the discriminatory exclusion of one class of witnesses—public employees—from statutory immunity in violation of the Equal Protection Clause of the Fourteenth Amendment.

It would discriminate against public employees by giving them not only a reduced privilege against self-incrimination, but a lesser immunity than New York has traditionally given to all other persons, *Matter of Kaffenburgh*, 188 N.Y. 49 (1907); *People ex rel. Taylor* v. *Forbes*, 143 N.Y. 219 (1894); *Matter of Solovei*, 250 App. Div. 117 (2d Dept. 1937), *aff'd* 276 N.Y. 647. As the Appellate Division pointed out in the last case, "the respondent could have been compelled to testify whether he was willing or not" by granting him immunity "because of that concerning which he has testified", 250 App. Div. at 120-121, and "the respondent's willingness to testify, as well also [as] the provisions of section 584 of the Penal Law, is an answer to the charge that, because he refused to waive immunity, he was endeavoring to conceal a wrong" *id.* at 121.

Finally, it is clear that since the petitioners were never informed of the existence of this "*Garrity* immunity" and that it was available for their protection, they were justified in asserting their Fifth Amendment right and refusing to speak. "A witness has, we think, a constitutional right to stand on the privilege against self-incrimination until

it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him." *Stevens* v. *Marks, supra,* at 246 and n. 11. See also *Raley* v. *Ohio,* 360 U.S. 423.

II.

Petitioners' dismissals from employment resulted from wiretapping in violation of both statute and the constitution.

A. Respondents first argue that the decisions in *Berger* v. *New York,* 388 U.S. 41, and *Katz* v. *United States,* 389 U.S. 347 "should not be applied retroactively to this case" (Resp. Br. 18) under the tests established in *Linkletter* v. *Walker,* 381 U.S. 618 and subsequent cases. Without conceding that constitutional rights should be thus limited (see dissenting opinion of Mr. Justice Black in *Linkletter* v. *Walker, supra* at 640), the instant case is distinguishable on a number of grounds.

First, unlike all of the cases cited by respondents, this case is not a collateral attack upon a final judgment. Petitioners, here, are not, as respondents suggest (Resp. Br. 23), in the same posture as were petitioners in *Johnson* v. *New Jersey,* 384 U.S. 719. Here the decision against petitioners was not final[4] prior to the Court's decisions in *Berger* and *Katz.* Thus to apply the principles enunciated in those cases to petitioners here would not threaten the finality of a conviction as respondents argue (Resp. Br. 23). It should be noted that the rulings in *Mapp* v. *Ohio,* 367 U.S. 643 and *Tehan* v. *Shott,* 382 U.S. 406 were applied to cases not final at the time those decisions were

[4] *Linkletter* v. *Walker, supra* at 622, fn. 5, defines "final" to mean "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari [has] elapsed."

rendered. See *O'Connor* v. *Ohio*, 382 U.S. 286 and *Fahy* v. *Connecticut*, 375 U.S. 85; *Ker* v. *California*, 374 U.S. 23, respectively.

Secondly, the administration of justice will not be adversely affected in the sense of "opening the jail doors" because this is not an attack upon a criminal conviction. No administrative hardship will follow since this is not a case where new evidence must be found to replace that held to have been illegally introduced.

Finally, respondents cannot point to "the reliance by law enforcement authorities on the old standards", *Stovall* v. *Denno*, 388 U.S. 293, 297. Unlike the cases cited by respondents, the wiretapping here was in plain violation of a federal statute with civil and criminal sanctions. In *Schwartz* v. *Texas*, 344 U.S. 199, the admission of wiretap evidence was permitted because of this Court's desire not to interfere with state criminal proceedings;[5] there was no question that the evidence was obtained in violation of § 605 of the Federal Communications Act, *Benanti* v. *United States*, 355 U.S. 96; *Pugach* v. *Dollinger*, 277 F. 2d 739 (2d Cir. 1960), *aff'd* 365 U.S. 458.

B. Respondents next argue that even if the wiretapping was illegal and unconstitutional, petitioners should not prevail because "these dismissals are connected to the wiretap by a tenuous series of links" (Resp. Br. 26). This is a misapplication of the concept of attenuation as it was used by Mr. Justice Frankfurter in *Nardone* v. *United States*, 308 U.S. 334, 341. The complaint alleges, the affidavits support, and the opinion below does not controvert the fact that the investigation itself "was the result of and accompanied by the interception and divulging of telephone con-

[5] *Harlem Check Cashing Corp.* v. *Bell*, 296 N.Y. 15 (1946) and *People* v. *Stemmer*, 298 N.Y. 728 (1948), *aff'd* by an equally divided court, 336 U.S. 963, cited by respondents (Br. 21) both involved the admissibility of evidence obtained in violation of the federal statute.

versations to which the individual plaintiffs were parties, without the consent of the senders thereof" (R. 7a). The petitioners would not have been faced with the choice of surrendering their constitutional privilege or losing their employment if the Commissioner of Investigation had not violated federal law. It is therefore irrelevant that illegally obtained evidence cannot be used against the petitioners (Resp. Br. 26).

Respondents' statement that "the investigation and the subsequent tap were undertaken as a result of information received from a reliable informant" (Resp. Br. 27) does not legalize the wiretap. Nor does it dispose of the possibility that even that informant was a wiretapper. In *United States* v. *Coplon*, 185 F. 2d 629, 639 (2d Cir. 1950), *cert. denied* 342 U.S. 920, Chief Judge Learned Hand stated that:

> "[T]he testimony so far elicited suggested that the 'confidential informant,' who had touched off the investigation, might well have been a 'wiretapper'; and, if he had been, Judith Coplon was entitled to learn whether she had been a party to any of the intercepted talks."

Respondents have prevented a clarification of the issue by rejecting the petitioners' request for copies of the application for the wiretap order and the papers upon which it was based.[6]

C. Respondents are surely not serious in suggesting that petitioners might reasonably have assumed that their telephone conversations were wiretapped in violation of the federal statute (Resp. Br. 29). Further, there can be no "reasonable" wiretapping pursuant to Section 813-a of the New York Code of Criminal Procedure which this Court declared unconstitutional upon its face in *Berger* v. *New York, supra.* Therefore, there is no occasion for a remand to the district court.

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[6] Petitioners' Reply Brief herein of January 8, 1968, p. 7, n. 4, upon the petition for certiorari.

We conclude by noting respondents' argument that under *Schwartz* v. *Texas, supra,* wiretapping evidence does not invalidate the administrative proceedings below. The refusal of this Court in *Schwartz* v. *Texas, supra,* to reverse a state criminal conviction based upon wiretapping was the result of a belief that Congress, in enacting Section 605 of the Federal Communications Act, did not intend to impose a rule of evidence upon state courts. In *Benanti* v. *United States, supra,* the Court reiterated this view, stating: "[D]ue regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect." In *Stefanelli* v. *Minard,* 342 U.S. 117, 120, the Court had elaborated further on this theme when, in a federal suit to enjoin the use in a state criminal trial of evidence alleged to have been secured by an unlawful state search, it said:

> "Here the considerations governing that discretion touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States."

The policy considerations precluding federal interference with state criminal prosecutions do not apply to dismissals from city employment based upon violations of a federal statute and of petitioners' rights under the federal Constitution.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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April 26, 1968

SUPREME COURT OF THE UNITED STATES

No. 823.—October Term, 1967.

Uniformed Sanitation Men Association, Inc., et al., Petitioners, *v.* Commissioner of Sanitation of the City of New York et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 10, 1968.]

Mr. Justice Fortas delivered the opinion of the Court.

The individual petitioners are 15 employees of the Department of Sanitation of New York City. Claiming they were wrongfully dismissed from employment in violation of their rights under the United States Constitution, they commenced this action for declaratory judgment and injunctive relief in the United States District Court for the Southern District of New York. That court dismissed the action and the Court of Appeals for the Second Circuit affirmed. 383 F. 2d 364 (1967). We granted certiorari. — U. S. — (1968).

Sometime in 1966, the Commissioner of Investigation of New York City[1] began an investigation of charges that employees of the Department of Sanitation were not charging private cartmen proper fees for use of certain city facilities and were diverting to themselves the proceeds of fees that they did charge. The Commissioner obtained an order from the Supreme Court in New York County authorizing him to tap a telephone leased

[1] Section 803 (2) of the New York City Charter provides that the Commissioner "is authorized and empowered to make any study or investigation which in his opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency."

by the Department of Sanitation for the transaction of official business at the city facilities in question.[2]

In November 1966 each of the petitioners was summoned before the Commissioner. He was advised that, in accordance with § 1123 of the New York City Charter, if he refused to testify with respect to his official conduct or that of any other city employee on the grounds of self-incrimination, his employment and eligibility for other city employment would terminate.[3]

Twelve of the petitioners, asserting the constitutional privilege against self-incrimination, refused to testify. After a disciplinary hearing held pursuant to § 75 of the New York Civil Service Law, they were dismissed by the Commissioner of Sanitation on the explicit ground provided by § 1123 of the City Charter that they had refused to testify.

Three of the petitioners answered the questions put to them, denying the charges made. They were thereafter suspended by the Commissioner of Sanitation on

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[2] This order was pursuant to § 813–a of the Code of Criminal Procedure of New York. See *Berger* v. *New York*, 388 U. S. 41 (1967).

[3] Section 1123 of the New York City Charter provides:

"If any councilman or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

the basis "of information received from the Commissioner of Investigation concerning irregularities arising out of [their] employment in the Department of Sanitation." Subsequently, they were summoned before a grand jury and asked to sign waivers of immunity. They refused. Administrative hearings were held pursuant to § 75 of the Civil Service Law, and they were dismissed from employment on the sole ground that they had violated § 1123 of the City Charter by refusing to sign waivers of immunity. We consider only the dismissal, rather than the suspension, of these petitioners.

Relying upon the decision of the New York Court of Appeals in *Gardner* v. *Broderick*, 20 N. Y. 2d 227, 229 N. E. 2d 184 (1967) (reversed this day, *ante*, ——), the Court of Appeals for the Second Circuit held that the dismissal of petitioners did not offend the Federal Constitution. For the reasons which we elaborate in our opinion reversing the New York court's decision in *Gardner* v. *Broderick, supra*, we hold that the Court of Appeals erred.

Petitioners were not discharged merely for refusal to account for their conduct as employees of the city. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. They were discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion, despite their constitutional privilege. Three were asked to sign waivers of immunity before the grand jury. Twelve were told that their answers to questions put to them by the Commissioner of Investigation could be used against them in subsequent proceedings,[4] and were discharged for refusal to

[4] The Commissioner said:

"Mr. [name of witness], this is a private hearing being conducted by the Department of Investigation of the City of New York, pursuant to Chapter 34, of the New York City Charter. The investiga-

answer the questions on this basis. *Garrity* v. *New Jersey*, 385 U. S. 493 (1967), in which we held that testimony compelled by threat of dismissal from employment could not be used in a criminal prosecution of the witness, had not been decided when these 12 petitioners were put to their hazardous choice. In any event, we need not decide whether these petitioners would have effectively waived this constitutional protection if they had testified following the warning that their testimony could be used against them. They were entitled to remain silent because it was clear that New York was seeking not merely an accounting of their use or abuse of their public trust, but testimony from their own lips which, despite the constitutional prohibition, could be used to prosecute them criminally.[5]

As we stated in *Gardner* v. *Broderick, ante*, if New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and

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tion in which you are about to testify relates particularly to the affairs, functions, accounts, methods, personnel and efficiency of the Department of Sanitation of the City of New York. I wish to advise you that you have all the rights and privileges guaranteed by the laws of the State of New York and the Constitutions of this State and of the United States, including the right to remain silent and the right not to be compelled to be a witness against yourself. *I wish further to advise you that anything you say can be used against you in a court of law.* You have the right to have an attorney present at this hearing, if you wish, and I understand that you are represented by counsel in the person of [name of attorney], is that correct?" (Emphasis added.)

[5] As we noted in *Gardner* v. *Broderick, ante*, p. —, the possible ineffectiveness of this waiver does not change the fact that the state attempted to force petitioners, upon penalty of loss of employment, to relinquish a right guaranteed them by the Constitution.

if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake. But here the precise and plain impact of the proceedings against petitioners as well as of § 1123 of the New York Charter was to present them with a choice between surrendering their constitutional rights or their jobs. Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination. *Gardner* v. *Broderick, ante; Garrity* v. *New Jersey, supra.* Cf. *Murphy* v. *Waterfront Commission,* 378 U. S. 75, at 79 (1964). At the same time, petitioners, being public employees, subject themselves to dismissal, after proper proceedings, if they refuse to account for their performance of their public trust which do not involve an attempt to coerce them to relinquish their constitutional rights.

Accordingly, the judgment is reversed.[6]

Reversed.

MR. JUSTICE BLACK concurs in the result.

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[6] In view of our disposition of the case, we do not reach the issues raised by petitioners with respect to the wiretap.